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TORRENS TITLE CASES:

BEING 422a

A COLLECTION OF IMPORTANT CASES

DECIDED BY THE

COURTS OF ENGLAND, AUSTRALASIA AND CANADA
UPON STATUTES RELATING TO

THE TRANSFER OF LAND BY REGISTRATION OF TITLE,

WITH A FULL DIGEST OF THE CASES.

BY

WILLIAM HOWARD HUNTER, B. A.,

(Of Osgoode Hall, Barrister-at-Law, Author of Treatise on "The Insurance Corporations Act,". Etc.,

TO WHICH IS PREFIXED A SUMMARY OF

TORRENS TITLE LEGISLATION,

WITH INTRODUCTION BY

J. HOWARD HUNTER, M.A.,

(Of Osgoode Hall, Barrister-at-Law.)

VOLUME I.

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ABBREVIATIONS.

A. C. or Ap. Ca. or App. Cas.—Appeal Cases in English Law Reports.

A. J. R.—Australian Jurist Reports.

A. L. T. —Australian Law Reports.

L. R.—English Law Reports.

R.—The Reports.

V. L. R.—Victorian Law Reports.

V. R.—Victorian Reports.

W. & W.—Wyatt and Webb's Reports (Victoria).

W., W. & a'B.—Wyatt, Webb and a'Beckett's Reports (Victoria).

CORRIGENDA.

Page 113.—In 14th line, for reference to foot note 22 read 23.

141.—Correct references to foot notes so as to read as follows:—"Goddard on Easements (2nd edition), 214, Peacock v. Penson[5] . . . In re Whyte[6] . . . Davis v. Queen,[7] and Espley v. Wilkes.[8]"

142.—In foot note 18, read "6 Jur. 144."

197.—In head note, to "2 V. R. (M) 27" add: "2 A. J. R. 133."

199.—In 18th line, for "Haggart" read "Hoggart."

213.—Staunton v. Brown.—This case is cited as "Staughton v. Brown."

231.—In 13th and 14th lines read "Warner v. Jacob (20 Ch. D. 220.) . . . Ross v. Victorian Permanent Building Society." Also in 35th line read "Parkinson v. Hanbury (L. R. 2 H. L. 10)."

240.—In 36th line, for "Foster" read "Forster."

242.—In 3rd foot note read "9 Jur. N. S. 958."

255.—In 23rd line read "Beavan v. Chadwick."

371.—In 14th line read "Nepean v. Doe d. Knight."

373.—In head note read "13 V. L. R. 484."

416.—In head note read, "I. E. & M."

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A TABULAR SUMMARY

—OF—

TORRENS TITLE LEGISLATION

—BY—

J. HOWARD HUNTER, M.A.

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I. SOUTH AUSTRALIA.

1858. 21-22 Vic. No. 15.—The "Real Property Act"—proposed (1857) and carried (Jan'y, 1858), by Robert Richard Torrens, of Adelaide, then Premier, and afterwards Registrar-General of South Australia. It is the original Torrens Title Act, upon which, as modified in 1858-1861, all subsequent legislation in the Australasian Colonies and elsewhere is ultimately founded.

1858. 21-2 Vic. No. 16.—An Act to amend the Real Property Act.

[1859.—"The South Australian System of Conveyancing," by Robert R. Torrens, Adelaide, Australia, 1859.]

1860. 23-4 Vic. No. 11.—The Real Property Act of 1860.—Consolidated and amended the foregoing Acts.

1861. 24-5 Vic. No. 22.—An Act to amend the Real Property Act of 1860.—Cited (Sec. 2) as the "Real Property Act of 1861." Preliminary to the framing of the Act of 1861, a Royal Commission was issued by the Governor of South Australia, to consider and report on the Consolidated Act of 1860. The Commission, which included Sir Charles Cooper, Chief Justice of the Province, and R. R. Torrens, Registrar-General, sat at intervals from April to December, 1861, and took a large mass of evidence which by order of the Provincial Legislature was printed. The Commission reported a bill amending the Act of 1860. "This bill," Mr. Torrens said, "is the result of the adverse and friendly criticism of a great part of the legal profession in the Colo-

nies of South Australia, Tasmania, Victoria, and Queensland. The Attorney-General of Queensland went through all, and so did the Solicitor-General. The Attorney-General and Solicitor-General of Tasmania have been through it, and so have our two Judges. Then we have had Mr. Allport, Mr. Fisher, Mr. Ireland, Mr. Fellowes, and all these legal gentlemen trying to pick holes in it, and pointing out whatever they could against it, and, whenever there was any reasonable doubt or even colorable pretence almost of an objection, we have altered it to meet their view."

1869-1870. 33 Vic. No. 11.—An Act to amend the Real Property Act of 1861.—Cited (Sec. 8) as the Real Property Act Amendment Act, 1869.

1878. 41-2 Vic. No. 128.—An Act to amend the Real Property Act of 1861, and to repeal the Real Property Amendment Act, 1869, and for other purposes.—Cited (Sec. 2) as "Real Property Act Amendment Act of 1878."

1881. No. 223.—"An Act to amend the Real Property Act, 1861, and for other purposes."—Cited as the "Right of Way Act, 1881."

1886. 49 & 50 Vic. No. 380.—"An Act to consolidate and amend the Real Property Act, 1861; the Real Property Amendment Act, 1878; and the Rights of Way Act, 1881; and for other purposes."—Cited (Sec. 1) as "Real Property Act, 1886."

1887. 50 & 51 Vic. No. 403.—"An Act to amend the Real Property Act, 1886."—Cited (Sec. 1) as the "Real Property Amendment Act, 1887."

1893. 56 & 57 Vic. No. 569.—Real Property Amendment Act, 1893.

II. VICTORIA.

1862. 25 Vic. No. 140.—The Real Property Act, 1862. Founded upon Torrens South Australian Act of 1861. Amended by Nos. 180, 210, 223. Repealed and re-enacted by the Transfer of Land Statute (1866), No. 301.

1866. 29 Vic. No. 301.—Cited (Sec. 1) as "Transfer of Land Statute." This Act, which has been the sub-

ject of very full judicial interpretation (vide the cases in this volume, passim), was in 1890, with its amending Acts, consolidated by No. 1149, the Transfer of Land Act, 1890.

1867. 31 Vic. No. 317. Transfer of Land (Amendment), 1867.

1869. 33 Vic. No. 353.—Transfer of Land (Dower), 1869.

1871. 35 Vic. No. 402.—Transfer of Land (Friendly Societies), 1871.—Enables (Sec. 1) trustees for time being of any society to effectually transfer the land.

1878. 42 Vic. No. 610.—Transfer of Land (Easements), 1878.

1885. 49 Vic. No. 835.—Transfer of Land (Public Buildings Protection), 1885.

49 Vic.. No. 855.—Transfer of Land (Survey Boundaries), 1885.

49 Vic. No. 872.—Transfer of Land (Amendment), 1885.

1887. 51 Vic. No. 945.

1890. 54 Vic. No. 1149.—"An Act to consolidate the law relating to the Simplification of the Title to and the Dealing with Estates in Land." Cited (Sec. 1) as "Transfer of Land Act, 1890." Sec. 2 repeals 29 Vic. No. 301; 31 Vic. No. 317; 33 Vic. No. 353; 35 Vic. No. 402; 42 Vic. No. 610; 49 Vic. No. 872, except Secs. 67 and 68; 51 Vic. No. 945, except Secs. 9, 10 and 27.

III. NEW SOUTH WALES.

1862. 26 Vic. No. 9.—"An Act for the Declaration of Titles to Land and to Facilitate its Transfer."—Cited (Sec. 2) as the "Real Property Act." This Act was founded upon Torrens Acts (South Australia), 1858-1861.

1873. 36 Vic. No. 7.—"An Act to amend the Real Property Act of 1862."—Cited (Sec. 7) as the "Real Property Act Amendment Act of 1873."

1878. 41 Vic. No. 18.—"An Act to further amend the Real Property Act."—9th May, 1878.—Cited (Sec. 1) as the "Real Property Act further Amendment Act of 1877." By this Act the Statute of Limita-

tions does not run against the registered owner and no length of adverse possession displaces his title.

1893. 56 Vic. No. 16.—"An Act to grant Conveyancers Certain Powers Under the Acts 26 Vic. No. 9, 36 Vic. No. 7, and 41 Vic. No. 18" (Real Property Act and Amending Acts).—Cited (Sec. 2) as the "Conveyancers' Enabling Act of 1893."

IV. QUEENSLAND.

1861-1862. 25 Vic. No. 14.—"An Act to Simplify the Laws relating to the Transfer and Encumbrance of Freehold and other Interests in Land."—Cited (Sec. 2) as the "Real Property Act of 1861.—Went into operation January, 1862. Founded on the South Australian Act of 1861.

1877. 41 Vic. No. 18.—"An Act to amend the Real Property Act of 1861." Cited (Sec. 2) as The "Real Property Act of 1877."

1888. Consolidation of Queensland Statutes.

V. WEST AUSTRALIA.

1874. 38 Vic. No. 13.—"An Act to Simplify the Title to and the Dealing with Estates in Land."—Cited (Sec. 2) as the "Transfer of Land Act, 1874."

1878. 42 Vic. No. 15.—"An Act to amend the Transfer of Land Act, 1874."—Cited (Sec. 1) as the "Transfer of Land Act, 1874, Amendment Act, 1878."

1879. 43 Vic. No. 17.—"An Act to further amend the Transfer of Land Act, 1874."

VI. TASMANIA.

1862. The Real Property Act.—Went into operation 1st July, 1862.—Founded on the South Australian Act of 1861.

1875. In Sess. Paper No. 45, H. J. Brickland, Recorder of Titles, summarizes the operations under the Real Property Act from 1st July, 1862, to 30th June, 1875.

1878. No. 9.—Real Property Act.

1883. No. 19.—"Conveyancing and Law of Property Act, 1884" (Sic).

1883. Sess. Paper 48.—Report by G. Patten Adams upon the working of the Act. In the twenty-one years of its operation land to the value of £1,761,245 had been brought under the Act, and no claim had ever been made upon the Assurance Fund.

VII. NEW ZEALAND.

1870. 33-34 Vic. No. 51.—"An Act to Simplify the Title to and the Dealing with Estates in Land."—Cited (Sec. 1) as the "Land Transfer Act, 1870." This Act repealed the Land Registry Act, 1860 (which provided for the registration of title on a somewhat different plan), and completely assimilated the system to that of the Australian Colonies.

1871. 34 Vic. No. 12.—The Land Transfer Act, 1870, Amendment Act, 1871.

1874. 37 Vic. No. 15.—The Land Transfer Act, 1870, Amendment Act, 1874.

1876. 39 Vic. No. 67.—The Land Transfer Act, 1870, Amendment Act, 1876.

1880. 42 Vic. No. 8.—An Act to amend the Land Transfer Act, 1870.—Cited as the "Land Transfer Act Amendment Act, 1880."

1883. 46 Vic. No. 32.—The Land Transfer Act, 1870, Amendment Act, 1883.

1885. 49 Vic. No. 57.—The "Land Transfer Act, 1885." This Act, which went into operation 1st January, 1886, consolidated, and by Sec. 224 repealed the Land Transfer Act, 1870, and Amending Acts, i.e., all the above Acts. It also repealed by Sec. 224, the Deeds Registration Act, 1868 (1868, No. 51), "so far as relates to land after it has been brought under the provisions of this Act."

1888. 52 Vic. No. 40.—"An Act to amend the Land Transfer Act, 1885."—Cited (Sec. 1) as the "Land Transfer Act Amendment Act, 1888."

1889. 53 Vic. No. 29.—"An Act to amend the Land Transfer Act, 1885."—Cited (Sec. 1) as the "Land Transfer Act, 1885, Amendment Act, 1889."

VIII. DOMINION OF CANADA, (TERRITORIES).

1878. Bill introduced by the Hon. David Mills, Minister of the Interior, to apply the Torrens system to the North-West Territories.

1883. Bill for the same purpose by Mr. Dalton McCarthy, Q.C., read a first time in the Commons April 12.

1884-1885. Bill for the same purpose by Hon. Sir Alexander Campbell, Minister of Justice, carried through the Senate and read a first time in Commons.

1886. 49 Vic. c. 26 (D.).—"An Act respecting Real Property in the Territories."—Cited (Sec. 1) as the "Territories Real Property Act."—Repealed and re-enacted by R. S. C. c. 51.

1886. Revised Statutes of Canada (R. S. C.), c. 51—re-enacting the preceding Act.—Repealed by Land Titles Act, 1894.

1887. 50-51 Vic. c. 30 (D.).—"An Act to amend the Revised Statutes, c. 51, respecting Real Property in the Territories."—Repealed by Land Titles Act, 1894.

1888. 51 Vic. c. 20 (D.).—"An Act further to amend c. 51 of the Revised Statutes of Canada, the 'Territories Real Property Act.'"—Repealed by Land Titles Act, 1894.

1894. 57-58 Vic. c. 28 (D.).—"An Act to Consolidate and amend the Acts respecting Land in the Territories."—Cited (Sec. 1) as the "Land Titles Act, 1894."—Repeals (by Sec. 146) R. S. C. (1886) c. 51; 50-51 Vic. c. 30; and 51 Vic. c. 20.—In this Act "Territories" means the North-West Territories, the District of Keewatin, and all other Territories of Canada. (Sec. 2 (q).)

IX. PROVINCE OF ONTARIO.

1885. 48 Vic. c. 22.—"An Act to Simplify Titles and to Facilitate the Transfer of Land."—Cited (Sec. 1) as the "Land Titles Act, 1885."—Founded upon the Imperial Act, 38 and 39 Vic. c. 87. (Lord Cairns' Act. See infra under Great Britain).—Repealed

and re-enacted, with amendments, by Revised Statutes of Ontario, 1887 (R. S. O. 1887), c. 116.

1887. 50 Vic. c. 14.—"An Act respecting the Custody of Documents relating to Land Titles."—Cited (Sec. 1) as the "Custody of Title Deeds Act."—Continued as R. S. O., 1887, c. 115.

1887. 50 Vic. c. 15.—"An Act to Extend the Operation of the Land Titles Act, and otherwise amending the same."

1887. 50 Vic. c. 16.—"An Act to Extend the Land Titles Act to the Outlying Districts of the Province."

1887. Revised Statutes of Ontario, 1887, c. 115.—"An Act respecting the Custody of Documents relating to Land Titles."—Repealed and re-enacted, 50 Vic. c. 14.

1887. Revised Statutes of Ontario, 1887, c. 116.—"An Act to Simplify Titles and to Facilitate the Transfer of Land."—Cited (Sec. 1) as the "Land Titles Act." —Consolidated and repealed all the foregoing Acts, except 50 Vic. c. 14.

1888. 51 Vic. c. 12, s. 5.—Amending Sec. 53 of R. S. O. 1887, c. 116.

1889. 52 Vic. c. 20.—"An Act to Regulate Certain Matters under the Land Titles Act."

1890. 53 Vic. c. 32.—"An Act to Further Facilitate Proceedings under the Land Titles Act."—Cited (Sec. 1) as the "Land Titles Amendment Act, 1890."

1892. 55 Vic. c. 24.—"An Act to amend the Land Titles Act."

1893. 56 Vic. c. 22.—"An Act to Make Further Provision respecting the Registration of Land under the Land Titles Act."—Cited (Sec. 1) as the "Land Titles Act, 1893."

1893. 56 Vic. c. 23.—"An Act to Establish an Office of Land Titles for the District of Rainy River."

1895. 58 Vic. c. 13, s. 31, amending s. 53 (6) of R. S. O. c. 116.

X. PROVINCE OF MANITOBA.

1885. 48 Vic. c. 28.—The "Real Property Act of 1885."—Went into force 1st July, 1885.—Consolidated and repealed by the "Real Property Act of 1889."

1886. 49 Vic. c. 28.—"An Act to amend the 'Real Property Act of 1885,' and for other purposes."

1887. 50 Vic. c. 11.—"An Act to further amend the Real Property Act of 1885,' and the Act amending the same."

1888. 51 Vic. c. 21.—"An Act to further amend 'The "Real Property Act of 1885,' and for other purposes."

1888. 51 Vic. c. 22.—"An Act to amend the Real Property Act of 1885 and Amending Acts."

1889. 52 Vic. c. 16.—"An Act respecting Real Property in the Province of Manitoba."—Cited (Sec. 1) as the "Real Property Act of 1889."—Consolidates and repeals (Secs. 2, 18, 152) all the foregoing Acts. This Act was itself with amendments consolidated by R. S. M. (1891) c. 133.

1890. 53 Vic. c. 5.—"An Act to amend c. 16 of 52 Vic., being 'An Act respecting Real Property in the Province of Manitoba.'"

1891. 54 Vic. c. 6.—"An Act to amend c. 16 of 52 Vic., being 'An Act respecting Real Property in the Province of Manitoba and amendments.'"

1891. Revised Statutes of Manitoba, c. 133.—The "Real Property Act" (Sec. 1) consolidates the Real Property Act of 1889 and Amending Acts.

1894. 57 Vic. c. 30.—"An Act to amend the Real Property Act" (R. S. M. c. 133).

XI. PROVINCE OF BRITISH COLUMBIA.

1870. 33 Vic. No. 17.—"An Ordinance to Assimilate the Law relating to the Transfer of Real Estate and to Provide for the Registration of Titles to Land throughout the Colony of British Columbia." (1st June, 1870).

1879. 42 Vic. c. 22.—"An Act to amend Sec. 4 of the 'Land Registry Ordinance, 1870.'"

1871. Revised Laws of British Columbia, 1871, No. 143.

1872. 35 Vic. c. 31.—"An Act to amend the 'Land Ordinance, 1870.'"

1873. 36 Vic. No. 21.—"An Act to amend the 'Land Registry Ordinance, 1870.'" (21st February, 1873).

1884. 47 Vic. c. 17.—"An Act to amend the 'Land Registry Ordinance, 1870.'" [Amends Sec. 51].—Cited (Sec. 2) as the "Land Registry Amendment Act, 1884."

1885. 48 Vic. c. 17.—"An Act relating to the New Westminster District Land Registry Office."

1887. 50 Vic. c. 18.—"An Act to further amend the 'Land Registry Ordinance, 1870.'"

1888. 51 Vic. c. 17.—"An Act to further amend the 'Land Registry Ordinance, 1870.'"

1888. "The Consolidated Public General Acts of British Columbia, 1888" (short title, "Consolidated Acts, 1888") c. 67, "An Act relating to the Transfer of Real Estate, and to provide for the Registration of Titles to Land."—Cited (Sec. 1) as the "Land Registry Act."

1890. 53 Vic. c. 24.—"An Act to amend the 'Land Registry Act.'"—Cited (Sec. 5) as the "Land Registry Amendment Act, 1890."

1890. 53 Vic. c. 25.—"An Act to further amend the 'Land Registry Act.'"

1891. 54 Vic. c. 16.—"An Act to amend the 'Land Registry Act' and Amending Act."—Cited (Sec. 10) as the "Land Registry Amendment Act, 1891."

1892. 55 Vic. c. 26.—"An Act to amend the 'Land Registry Act.'"—Cited (Sec. 1) as the "Land Registry Amendment Act, 1892."

1893. 56 Vic. c. 23.—"An Act to amend the 'Land Registry Act' and Amending Acts.'"—Cited (Sec. 1) as the "Land Registry Act Amendment Act, 1893."

XII. GREAT BRITAIN.

1830. Report of the Real Property Commission on Registration. A paper contributed by Jeremy Bentham, and appended by the Commissioners to their report, deals with registration of title. The appendix also contains a suggestion from Mr. Fonnereau and Mr. Hogg for the application to land titles of the machinery of the Funds, being the same in principle as that of the Shipping Act,

which latter became in 1857 Mr. Torrens' model in his South Australian measure. In 1844, Mr. Robert Wilson worked out with some detail a similar suggestion in a publication which was discussed in the law periodicals. Registration of title was in 1846 discussed in an article in the "Westminster Review," and was about the same time taken up and reported on by a Committee of the

1853. Law Amendment Society. In 1853 it was recommended by the report of a Committee of the House of Commons.

1854-1857 The Royal Commission of 1854 reported unanimously in 1857 in favor of registration of title, though some individual Commissioners differed as to the precise method and extent of its application. Among the signatures to the report were those of Richard Bethel, afterwards L. C. Westbury, and Robert Lowe, afterwards Chancellor of the Exchequer, who had then returned from Australia.—In giving evidence before the Commission, Mr. Freshfield, a member of one of the first conveyancing firms in England, deposed that "title by deed can never be demonstrated as an ascertained fact; it can only be presented as an inference more or less probable, deducible from the documentary evidence accessible at the time being."

Lord Westbury's Legislation, 1862-5.

1862. Pursuant to the report of the Royal Commission in 1857, the Land Registry Act was passed,—25 & 26 Vic. c. 53 (England). This Act is entitled "An Act to facilitate the Proof of Title to, and the Conveyance of, Real Estate." The preamble contains this recital: "Whereas it is expedient to give certainty to the Title to Real Estate, and to facilitate the Proof thereof, and also to render the dealing with land more simple and economical." Provision was made for the permissible registration of such titles to freeholds and leaseholds in freeholds as a Court of Equity should hold to be marketable, i.e., would compel an unwilling purchaser to accept. Under the Torrens system, as worked out in the Australasian Colonies, a "marketable" title is not essential: title would be granted to a party in undisturbed possession, who showed "good-holding" title in event of non-claim after due advertisement and service of notice.

The Act was condemned by a report of a Royal Commission in 1870, and had already then become inoperative, partly on account of its requiring a marketable title and a definition of boundaries, and partly on account of its not giving in reality, —though in name,—an indefeasible title until there had been dealing with the registered land for valuable consideration subsequent to registration. And further, as Sir Robert Torrens himself ("Essay on the Transfer of Land by Registration") points out, the permissive use of deeds sanctioned (Sec. 63) by Lord Westbury's Act involves a combination of two incompatible principles—"registration of deeds" and "registration of title." Lord Westbury's Act still remains law as to titles registered under it, and not re-registered under Lord Cairns' Act of 1875. Simultaneously with this Land Registry Act, 1862, was passed the Declaration of Title Act, 1862,—25 & 26 Vic. c. 67 (England). "An Act for Obtaining a Declaration of Title." Under Secs. 1 to 3 of this latter Act any person entitled to apply for the registration of an indefeasible title under the Land Registry Act, 1862, may petition the Court of Chancery for a declaration of title, and the Court on proof of a marketable title is to issue a Certificate of Title under Seal of the Court. (Secs. 21, 22). A register of estates, titles, etc., is to be kept. (Sec. 39). Lord Westbury's Declaration of Title Act, 1862, became in 1865 the basis of the Quieting Titles Act of Upper Canada (Ontario), 29 Vic. c. 25, which has been continued as R. S. O. 1877, c. 110, and R. S. O. 1887, c. 113.

1863-1865. An Association formed in Dublin in 1863, with the Duke of Leinster at its head, endeavored to supplement the Landed Estates Court Act by a measure for Ireland analogous to the Torrens Acts of Australia. A bill was prepared under the direction of Sir Robert Torrens himself, and received its first reading in the Commons late in the session of 1863. During the next session the bill was altered to suit Lord Westbury, and, in spite of Torrens' remonstrances, certain provisions were imported into it antagonistic to the principle of registration of titles. The bill became law as 28 & 29 Vic. c. 88 (Ireland), and was entitled "An Act for the Recording of Titles in Ireland." The preamble recites: "Whereas it is expedient that titles conferred by the Landed Estates

Court, Ireland, should be kept free from complication so that subsequent dealings with the estates held under such title may be more simple and economical." Like the Land Registry Act, 1862, registration under this Act also was permissive, so that any person by signing a simple requisition could exclude the application of the Act to his land on its passing through the Estates Court. (Evidence of Mr. Urlin before the House of Commons Committee, 1879, Q. 1986 et seq.) Sec. 32 enabled persons whose properties were on the register to withdraw them at any period, and cases had occurred where owners had under pressure removed their title from the record. The Act also permitted the use of deeds and imposed a prohibitory tariff of fees. In the result, like Lord Westbury's two English Acts of 1862, his Irish Act of 1865 became a dead letter. Sir Robert Torrens sat in the Commons for the borough of Cambridge from 1868 to 1873, and in 1873 introduced a bill to rectify the Irish Act, but his bill did not get beyond the preliminary stage.

1868-1870. Royal Commission on Registration of Titles. Report (par. 63) affirms: "We have conclusively shown that purchasers do not want indefeasible title"! And again (par. 65) "The [Torrens] system is inapplicable to dealings with land, because ships are legally divided into sixty-four parts"! The value of a registered title is, however, grudgingly granted:—"It is as if a filter were placed athwart a muddy stream; the water above remains muddy, but below it is clear; and when you get so far down the stream as never to have occasion to ascend above the filter, it is the same thing as though the stream was clear from the source."

1870-1881. 25th February. Circular Despatch of Earl Granville (Colonial Secretary) to the Governors of the Australian Colonies, calling for reports on the working and progress of the system of conveyancing by registration of title. On 8th May, 1872, on motion of Mr. Torrens, the replies were brought down to the House of Commons and ordered to be printed.—On 1st September, 1880, the Earl of Kimberley (Colonial Secretary) addressed a circular despatch to the Australasian Colonies and to British Columbia for information supplementary to that obtained by Earl Granville, and the replies were brought down to the House of Com-

mons 10th May, 1881, and ordered to be printed. The replies of the Governors of the various Colonies concurred in affirming the complete success of the Torrens System.

1872. Attorney-General (afterwards Lord Chief Justice) Coleridge presiding at the Congress of the Law Amendment Society at Cheltenham, declared that "he had never been able to perceive the obstacle to applying to land the system of a transfer which answered so well when applied to shipping; but as his learned brethren, one and all, had declared that to be impossible, he had become impressed with the belief that there must be something wrong in his intellect, as he failed to see the impossibility. The remarkably clear and logical paper which was read by Sir R. R. Torrens relieved him from that painful impression, and the statistics of the successful working of his system in Australia amounted to demonstration; so that the man who denied the practicability of applying it might as well deny that two and two make four."

Lord Cairns' Act, 38 and 39 Vic., c. 87.

1875. 38 & 39 Vic. c. 87 (England).—"An Act to Simplify Titles and Facilitate the Transfer of Land in England." Cited (Sec. 1) as "The Land Transfer Act, 1875." Sir Robert Torrens (Essay, p. 41) criticizes this measure as follows:—"Lord Cairns' Act is to some extent obnoxious to the same objections which caused the miscarriage of that introduced by Lord Westbury. Notably, Sec. 49 admits of conveyancing of registered land being carried on by deed for an indefinite period. So far it is but a hybrid measure, an attempt to carry on two antagonistic principles in dealing with land. Again, as indefeasible title is given to purchasers only, it affords no inducement to holders to register, as they would not get their titles freed from technical defects and doubts, but would continue as regards future dealings, such as leases, mortgages, encumbrances, etc., under the present law, subject to all its cost, uncertainties, and delays. The official mechanism for carrying out this measure, though a great improvement on that prescribed by Lord Westbury, is yet sufficiently cumbrous to warrant the opinion of Mr. Spencer Follett (Chief of the Registry Department under Lord Westbury's Act) 'that it could not be carried on on such a scale as would compensate for the expense.'

The ad valorem charges also appear excessive and deterrent. Finally, even if free from these defects, the result of giving nominally to the proprietor, but practically to his solicitor, the option to place land under the system, and the power to withdraw it again from that system, is in itself sufficient to ensure its failure, as has been demonstrated in the case of the Irish Act."—Lord Cairns' Act, purged of most of these objectionable features, became, in 1885, the basis of the Ontario Act 48 Vic. c. 22, now continued as R. S. O. 1887, c. 116. See the last cited Act, Secs. 5, 16, etc.—Even worked under all those disadvantages, Lord Cairns' Act is now gaining ground in England, as appears from a return to an order of the House of Commons dated May 20, 1890, published in 89 Law Times, 183.

1878-1879. Select Committee of Commons on Land Titles and Transfers. The committee distinguished, rather inadequately, between registration of titles and registration of deeds, as follows: "Registration of titles is in the abstract to be preferred to registration of assurances; for the former aims at presenting the intending purchaser or mortgagee with the net results of former dealings with the property; whilst the latter places the dealings themselves before him, and leaves him to investigate them for himself. In the one case he finds, so to speak, the sum worked out for him; in the other, he has the figures given him, and he has to work out the sum for himself.

1880-1881. Lord Kimberley's Circular to Colonial Governors and replies thereto—See supra.

1889. A bill approved by Lord Salisbury's Government was introduced into the House of Lords by Lord Chancellor Halsbury, which provided that all future transfers of land be by registration of title under the guarantee of the state,—thus removing that permissive feature which did much towards making the measures of Lords Westbury and Cairns inoperative. The contribution to the assurance fund was placed at a farthing in the pound or less than one-tenth of one per cent. After obtaining its third reading, a circular prepared it was said in the interest of professional conveyancers, alarmed some of the peers by representing the exposure of a public register, and taking other

objections of a personal character, and notwithstanding the assurances of Lord Salisbury, Lord Chancellor Halsbury, Lord Selborne and other law lords, an amendment was carried by a majority of nine. The bill was thereupon withdrawn.

1891. 54 & 55 Vict. c. 66.—" An Act to establish Local Registries of Titles to Land in Ireland." Short title (sec. 1) the "Local Registration of Title (Ireland) Act, 1891."—Section 18 abolishes the Record of Title Office created by the Act of 1865 (see supra). All titles registered under that Act are to be registered under this Act without cost to the parties interested. Sec. 19 exempts from from registry of deeds land registered under this Act. By sec. 22, the first registration of land under this Act is voluntary, except in certain cases arising under the Purchase of Land (Ireland) Acts. But under sec. 25, where registration of ownership is compulsory, no title is acquired by the transfer until registered.

To render any such legislation for England effective, Sir Robert Torrens regarded the following provisions as imperative: " 1st.—The estate should pass on registration, not on the execution of a deed. 2nd.—The title under it should (except so far as regards possessory registration) be indefeasible. 3rd.—The registration should be compulsory upon the first dealing with the freehold after the date appointed for the Act to become operative. 4th.—The register should be metropolitan. 5th.—The adoption of the duplicate method of conducting registration as in operation in the Australasian Colonies. 6th.—Lands once placed on the register should not be withdrawn."

XIII.—UNITED STATES.

In the older States the system of registration of deeds has confessedly broken down by its own weight. Mr. Wm. D. Turner, of Boston, writing in the American Law Review for October, 1891 (25 Am. L. Rev. at p. 755), says: "It must be admitted that such disadvantages as our method of registration are rapidly increasing. The examination of title to land involves each year a greater amount of labor and a higher degree of skill. A business man accustomed to dealing with large interests in personal property is usually astonished

and disgusted upon first encountering the expense and delay incident to a transfer or mortgage of land. * * * For the first hundred years in which our system was in operation it was not difficult to do this [i.e. to ascertain whether the deeds shown in the abstract affect the matter in hand]:

Mass. in Massachusetts, for instance, seventy-nine books in the Suffolk County Register were sufficient to cover the period from 1650 to 1750; but during the year last past (1890), nearly twenty-four thousand deeds and other instruments were recorded there, making sixty volumes. These volumes contain 640 pages each, and are larger and more compactly written than the earliest ones; so that the quantity of matter recorded during the year last past is as great as recorded during the entire period of the first hundred years of the existence of the system. * * *

N. Y. "In the City of New York, without the assistance of the official searchers, who have private indexes of their own, a safe examination of the records is impossible. Nor is this assistance always considered sufficient. An enenterprising firm here published a 'Supplemental Index' or 'Searcher's Assistant,' with the assertion that more than two hundred duly recorded deeds are not referred to at all in the official indexes, and that the number of mistakes or erroneous references to be found in them is over two thousand."

Ill. In Illinois and especially in Cook County including Chicago), search of registered deeds has become so difficult and hazardous as to create and keep busy two new classes of corporations known as Abstract Companies and Title Guarantee Companies. Report to the Illinois State Bar Association by Prof. Harvey B. Hurd, of Chicago, as chairman of the Committee on Jurisprudence and Law Reform, published in 25 Am. L. Rev. (1891) 367. Professor Hurd estimates for the State of Illinois an annual expense of about $10.000,000 for abstracts and their examination. The Legislature has this year (1895) passed an "Act Concerning Land Titles," introducing the Torrens system in such of the counties of Illinois as shall adopt it by a simple majority vote. "If a majority of the votes cast on that subject shall be for the Torrens land title system, this Act shall thereafter be in force and apply to lands in that county." (Sec. 94.)

INTRODUCTION.

In the foregoing summary I have outlined the evolution of the statutes by which, in various countries, the Torrens System of Land Transfer has been introduced and extended. In the seven Australasian Colonies and in parts of Canada the Torrens System has completely displaced and superseded the old system of title and conveyancing by deeds; and, even in England, Lord Cairns' Act of 1875, notwithstanding its defects, is visibly gaining ground.

Where the title depends upon a chain of deeds, or other documents, the strength of the chain is necessarily no greater than that of the weakest link, and the very best chain of title always falls short of absolute proof. One of the most eminent conveyancers in England, giving evidence before the Royal Commission in 1856, said: "Title by deed can never be demonstrated as an ascertained fact; it can only be presented as an inference more or less probable, deducible from the documentary evidence accessible at the time being." Dart in his Treatise on Vendors and Purchasers (6th Ed., 1888, vol. I. p. 348) cautions solicitors against resting upon the former opinion of eminent counsel: "Titles, it is believed, are constantly accepted, almost without investigation, merely upon the faith of their having, on some previous occasion, been advised upon and accepted by counsel of eminence. It should, however, be remembered that the decisions of the various Courts of Law and Equity have a retrospective effect upon titles; so that in estimating the value of a favorable opinion taken a few years previously, allowance must be made for the possibility of the title having been since rendered unmarketable, possibly unsafe, by some intermediate exposition of the law."

Merely stamping and recording the links in the chain of title, as is done in a registry office, does not add any strength to the link or diminish the expense of conveyancing. Lord Cairns, when Attorney-General in 1859, speaking in the House of Commons, pronounced "the objections to a register of deeds to be so manifest that hardly any person in the present day would venture to propose it. It would not simplify title in the least. It only puts on a formal record the whole of that multitude of deeds and conveyances, of the extent and complexity of which we have already so much reason to complain. You have to investigate and search just as before; in addition to that you have to pay for searches in the register, and also to pay, in some shape or other, the expense of placing the deeds upon it." Six years after Lord Cairns uttered those words, Mr. Mowat, in an open letter upon the Quieting Titles Bill to Mr. J. A. Macdonald (then in charge of that bill as Attorney-General for Upper Canada), stated the practical results of the registration system in Upper Canada as follows:—

"All sorts of questions have to be considered in looking into a title, prior to making a purchase or accepting a mortgage. Are the deeds and wills through which the title is traced genuine instruments? or have any of them been forged or tampered with? Were they all duly executed? Have all the forms required by the statute been observed in the registration of them? Were all requirements of the Acts affecting married women complied with? Did every testator possess the requisite mental capacity at the time of signing his will? Was it read over to him? Did the witnesses subscribe their names in the presence of one another? Even in regard to these ordinary questions that occur on almost every title, examples of misinformation and misfortune have not been wanting.

"But sometimes much more difficult questions than these have to be determined as to the construction of wills. Occasionally, difficulties of this class entirely

escape attention while a title is investigated. And, at other times, a wrong conclusion is come to in reference to them.

"Then questions of identity, and questions relating to possible claims for dower, have sometimes been overlooked by former purchasers, and involve considerable perplexity in subsequent investigations."

After noticing various other difficulties, Mr. Mowat proceeded: "Again, in the country large blocks of farming land often depend on a single title; or a farm lot is, in the formation of our cities, towns, and villages divided into building lots; and a flaw in the title of one of those who owned the property before the division of it destroys the title not of one person only, or of one family only, but of many persons and many families.

"It often happens too, that the original title is, in such cases, less carefully examined than if there had been no subdivision, and one person was buying all. Parties appear to think that a weak title acquires strength by the number of persons who hold by it; or everybody assumes that his neighbor has examined the title and found it correct, and he trusts to this supposed investigation in order to avoid the expense of an independent investigation of his own. Where there are easy methods for obtaining an indefeasible title, no one would think of subdividing his land without first obtaining a certificate of title.

"Our Registry law has, beyond all controversy, been of immense advantage to the country; and yet in regard to any of the questions I have spoken of, it cannot be said to afford any protection whatever; we need something to supplement its provisions before our titles can have the reliability which it is very desirable they should possess. The Registry law in fact provides for but one source of danger to a purchaser, namely, unknown conveyances affecting the property. It affords little or no aid in ascertaining the validity of conveyances, the proper construction of deeds and wills, or any events affecting title, otherwise than by written instruments; or in

supplying the future proof of such events. These things may be of greater moment to an intending purchaser than the possibility of there being some deeds affecting the property of which, but for the registry law, he would not have known. * * *

"It is a further serious inconvenience, connected with our existing system, that if a purchase is effected, or a loan granted after an investigation which satisfies the solicitor employed that the title is good, the whole investigation has to be gone over again before every fresh transaction in reference to the property; and a title that was satisfactory to one lawyer may not be satisfactory to another; as, among lawyers, there are all degrees of professional skill and knowledge, and all degrees of prudence and caution as well as of experience. Besides, the ablest and most cautious lawyers may occasionally make a slip or overlook a defect which an inferior man may happen to detect. Sometimes, therefore, one solicitor finds it his duty to reject a title which another solicitor has examined and passed; and this is the case not only in Canada but in England also, where conveyancing is a distinct branch of professional practice, and has received a degree of careful attention which it is not possible for general practitioners in Canada to give to it."

Since those words were written the older parts of Ontario have had thirty years more of registering deeds; and, though the machinery of registration has been much improved, the force of the intrinsic objections above stated is nowise impaired.

In Australia the same difficulties were experienced under a like system of registry, and it was there that an effective remedy was worked out by the genius of Robert Torrens. Torrens was collector of customs at Port Adelaide in South Australia, and the transfer and mortgaging of ships under the Merchant Shipping Act, 1854 (17 & 18 Vic. (Imp.) c. 104, sections 55 et seq.), had become a familiar operation to him. By a bold and brilliant extension of the same principles to lands, he proposed to give each successive transferee what was in

effect a new patent from the Crown, instead of a mere derivative title inferred from a chain of documents. Devised in 1856, extensively discussed in 1857, the new scheme of land transfer became the law of South Australia in January, 1858, and went into operation in July, —Torrens himself having been specially sent to Parliament with a band of supporters all bearing a mandate from the people to reform the law. His bill became law. Torrens withdrew from political life and devoted himself to administering his own Act. The subsequent stages of legislation in South Australia, the rapid spread of the Torrens System to other countries, can be traced in the Summary of Legislation above given.

In the Australasian Colonies the Torrens System has now been worked out with the greatest fulness, and under numerous decided cases has acquired great uniformity of procedure and practice. The following outline of Torrens' System as finally perfected by his own hands will make clearer the important cases decided under the Australasian statutes and reported below. In this outline I have followed as closely as possible Torrens' own explanation as contained in his various publications.

Every certificate of title representing the freehold forms a distinct root of title and is made in duplicate, one original being issued to the person entitled, while the other is bound into the register and constitutes a distinct folium thereof. A folium may comprise one or more pages for recording the memorials of mortgages or other dealings, whether with the fee simple or any lesser estate or interest, and whether subsisting at the time of issuing the certificates or subsequently created. Torrens strongly insisted on the duplicate system as both facilitating dealings and safeguarding against fraud.

In the case of transfer of the fee of part only of the land comprised in any certificate of title, the memorial of such transfer may be entered on the existing certificate, or the transferor may take out a fresh certificate

for the part unsold, but in such cases it is obligatory on the transferee to take out a fresh certificate, which will then form a fresh root of title, occupying a fresh folium of the register. Entry of memorial of any transfer, charge or other dealing upon the folium of the register appropriated to the land dealt with constitutes registration. Instruments marked with certificate of registration are held to be embodied constructively in the register. They must be executed in duplicate, one original to be filed in the Registry Office, while the other is held by the party entitled.

Estates in land when once registered are held subject to such charges, estates and interests as are notified on the appropriate folium of the register and endorsed on the certificate of title held by the owner, but free from all other charges, estates or interests whatsoever. They take priority among themselves according to the date of registration, and over all unregistered estates or interests whatsoever, except when registration has been obtained by fraud.

The registration of a bona fide dealing for value gives indefeasible title, even though it be from or through a person who may have obtained registration fraudulently. To provide for compensation when indefeasible title has been granted through mistake, an assurance fund is maintained by a small contribution levied upon the value of land when first brought under the system, and upon the value of land descended from a registered owner, testate or intestate.

On payment of a small fee a registered owner may at any time exchange his certificate of title for a fresh one, from which the memorials of all released mortgages and other charges, or lesser estates which have ceased to affect the land, would be omitted. The registrar, where a certificate of title is overloaded with memorials of defunct charges or lesser estates, requires the registered owner to take out a fresh certificate freed from such defunct memorials.

Each registered instrument bears a number or symbol indicating the volume and folium of the register where the history of the title is recorded, and thus discloses without other search all that it may concern any one intending to deal with the land to know. The practice in equitable mortgages is as follows:—The borrower executes a contract for charge in the authorized form, either for a specified sum, or to secure a floating balance. This contract, together with the borrower's certificate of title, is held by the creditor, who does not register, but lodges a caveat forbidding the registration of any dealing with the land until fourteen days, or other named period, have elapsed after notice of intention served by the registrar at an address given. A red-ink cross, with the number of the caveat, is then inscribed on the proper folium of the register. The creditor, upon the receipt of such notice, or at any time, may turn his equitable mortgage into a registered charge, by presenting the contract for charge with the borrower's certificate of title at the registry office.

The non-registration of trusts which prevails in the transfers of ships, of the public funds and of shares in companies, has been applied to land under the Torrens System. But though no notice of trusts can be entered on the register, a registered owner, desiring to settle his estate through trustees, may transfer his estate to one or more persons, and then deposit in the registry office for safe custody and reference any instrument declaratory of trusts executed by the transferees, and by caveat prohibit the registration of any dealing, except in accordance therewith, or with the sanction of one of the Superior Courts. He may also direct the words "No survivorship" to be entered on the certificate of title, the effect of which will be that without the sanction of the Court no dealing with the property can take place until any vacancy occasioned by death or otherwise in the original number of trustees has been filled up. Persons beneficially interested in any settled estate may by caveat bar the registration of any dealing therewith, either absolutely, or until after notice for a time specified

has been lodged at an address given. The registrar himself may also, if he thinks proper, lodge a caveat to protect the interest of a cestui que trust.

The statutes introducing the Torrens System into various countries having been either directly moulded by Torrens himself, or modelled upon his Acts, the whole body of legislation is in its principles and in its chief details homogeneous to such a degree as to make cases decided under the statutes of any one legislature available for the cases arising under the statutes of any other. The difficulty hitherto has been to obtain access to these widely dispersed cases which, in addition to their dispersion in numerous series of very expensive reports, are there found associated with numerous cases on other branches of law entirely unserviceable, except in the domestic forum. In the present volume are fully reported a large number of important cases which deal with leading principles, and are, therefore, of general application wherever the Torrens system is in force. The digest is designed to bring out fully all important points contained in each judgment, and the statute interpreted is sufficiently cited to enable the reader to compare the text so expounded with the corresponding provision in the law of his own country.

J. H. H.

CASES

ON THE

TORRENS SYSTEM OF LAND TITLES.

PRIVY COUNCIL.[1] [L. R. 1891, A. C. 248.

GIBBS (Defendant) Appellant,

AND

MESSER (Plaintiff), McINTYRES AND CRESSWELL (Defendants) Respondents.

On appeal from the Supreme Court of Victoria,[2]

Law of Victoria—Transfer of Land Statute—Forged Transfer—Fictitious transferee—Forged mortgage—Effect of registration.

The Victorian "Transfer of Land Statute" protects those who derive a registered title bona fide and for value from a registered owner. Accordingly they need not investigate the title of such owner, for they are not affected by its infirmities. But they must ascertain at their own peril his existence and identity, the authority of any agent to act for him, and the validity of the deed under which they claim.

The name of a registered owner having been removed in favour of a fictitious and non-existing transferee as the result of a forged transfer, a mortgage purporting to have been executed by said transferee was subsequently put upon the register by bona fide mortgagees.

In a suit by the true owner against the registrar, the mortgagees, and the perpetrator of the fraud :—

Held—(*a*) That the plaintiff's name must be restored to the register ; (*b*) That the mortgage was invalid, and did not in favour of the mortgagee constitute an incumbrance on the plaintiff's title ; though under the Act it would have that effect in favour of a bona fide registered assignee thereof.

Appeal from an order of the Supreme Court (10th of November, 1887), affirming with a variation an order of Webb, J. (18th of August, 1887), which was to the effect that the Registrar of Titles should pay to the respondent, Mary Stuart-Messer, out of the assurance

[1] Present :—Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Herschell, Lord Macnaghten, Lord Morris, and Mr. Shand, (Lord Shand).

[2] Reported sub nom. Messer v. Gibbs, 13 V. L. R. 854, 9 A. L. T. 106.

fund established by the 30th and other sections of the Transfer of Land Statute, her costs of her action and all moneys from time to time paid by her for interest in respect of an alleged mortgage, for £3,000, under which the respondents, McIntyre, claimed to be mortgagees, and also all moneys necessarily paid by her for principal, interest and costs to redeem the said mortgage.

[*249] The facts of the case are stated in the judgment of their Lordships.

The question in the appeal stated from the appellant's point of view was whether, according to the true construction of the Transfer of Land Statute (Act No. 301) a registered proprietor of land can be said to have been deprived of land within the meaning of section 144, and consequently to have become entitled to compensation out of the assurance fund by reason of a transfer from him to a non-existent person under a fictitious name having been forged, and by reason of such fictitious name having been substituted for his on the register as the proprietor, and by reason of a forged mortgage from such fictitious person to a registered mortgagee, who had bona fide advanced money on the security of such land.

The case was twice argued, on the first occasion before a committee composed as noted below :*

Sir H. Davey, Q.C., Finlay, Q.C., and Garner, for the appellant.

Rigby, Q.C., and Sargant, for Mrs. Messer.

The Attorney-General (Sir R. Webster) and Rashleigh, for the McIntyres.

For the appellant it was contended that there was nothing in the Transfer of Land Statute which could be relied on as giving validity to any document which purported to be a transfer either to or from a non-existing

*Present at the first hearing :—Lord Watson, Lord Holhouse, Lord Macnaghten, Lord Morris, and Sir Barnes Peacock.

person, although it might be in a name that had been placed upon the register. Nor was there anything in the Act which could give validity to a transfer purporting to be by a transferor who had never signed, or to a transferee who had never signed. Even if such a non-existing person could be held to have given under the operation of this Act a title to a bona fide transferee, without notice, still a document which only purported to create an incumbrance against himself, could not bind the land. The Act protects those who acquire the legal estate, not those who under a statutory mortgage acquire a mere interest in land.

[*250] If the Act is examined in detail, its provisions, as well as the general scheme and object, would be defeated if the transaction in this case were upheld and the assurance fund held answerable for them. It would not give certainty to title according to the preamble if the registered proprietor were liable to be deprived of his estate by a forged transfer purporting to be executed by him. The "dealings with land," which are the subject of the Act, must mean actual dealings by the actual registered proprietor, not dealings by forgers who are strangers to it. Further, it cannot be said that a fictitious person who has under Sec. 43 obtained a certificate of title under a forged transfer, is a proprietor of land within the meaning of that section. Sec. 47 does not help the other side, for it relates to a certificate in favour of a real proprietor and real applicant, not in favour of a fictitious name. No certificate was issued in this case to Cameron or to the mortgagees in such manner as is contemplated by the provisions of the Act. The transfers effected were not transfers within the meaning of the Act. Fraud in Secs. 49 & 50 does not include the fraud of the transferor. Sec. 144 only gives a right of action against the registrar if there be some existing person in whose name registration has been erroneously effected. The whole proceedings upon which the names of the McIntyres were entered on the register were a nullity, and passed no title to the respondents. It was not the intention of the

Act to guarantee that a particular name on the register represented a real person. Persons dealing with land on the faith of such name must ascertain for themselves the nature and effect of the particular transaction they make. If a binding transaction is made with a real registered owner, the Act guarantees that owner's title, but nothing more. His existence, the authority to act for him, and the genuineness of any deed which purports to be signed by him, are matters for which the respondents and not the Act are responsible. Reference was made to Cullen v. Thompson,[1] Fotheringham v. Archer,[2] Hassett v. Colonial Bank of Australia,[3] Oakdar v. Gibbs,[4] Ogle v. Aedey.[5]

[*251] For the respondents, McIntyres, it was contended that the land comprised in their mortgage was at the date of that transaction land under the operation of the Transfer of Land Statute. If Cresswell had been on the register instead of Cameron, and had executed the mortgage, the transaction could not have been impeached, for Cresswell's title would have been as it were guaranteed by the legislature. But in fact Cameron and Cresswell were the same person. The former was a name assumed by the latter, and the fictitious name represented a real owner whose registration and transactions were governed by the Act. Cresswell, as registered owner, though no doubt registered in an assumed name, effected a mortgage by a registered instrument, and thereby granted a title which was indefeasible under the Act. Reference was made to the preamble, Secs. 3, 4, 61, 47, 34, 40, 84, 36, 42, 49, 50; and to In re Imperial Mercantile Credit Association;[6] in re Hercules Insurance Company, Pugh and Shannon's case.[7]

[1] 5 Vic. L. R. Eq. 147.
[2] 5 Wyatt Webb & A'Beckett. 95.
[3] 7 Vic. L. R. L. 381.
[4] 8 Vic. L. R. L. 380.
[5] 13 Vic. L. R. 467.
[6] L R. 19 Eq. 588.
[7] L. R. 13 Eq. 566.

The McIntyres were innocent purchasers or mortgagees for value, without any notice, actual or constructive, at the time of making the mortgage, of any claim of the plaintiff, or of any fraud of Cresswell. The respondents, under all the circumstances of the case, were entitled to the remedy out of the assurance fund provided by Sec. 144, which was applicable to their case.

Sir Horace Davey replied.

The judgment of their Lordships was delivered by

LORD WATSON :—

This appeal depends upon the construction of the Transfer of Land Statute No. 301 of 1866, which established a register of titles and incumbrances for the colony of Victoria, in order "to give certainty to the title to estates in land, and to facilitate the proof thereof, and also to render dealings with lands more simple and less expensive."

The facts of the case, as far as they bear upon the question which we have to decide may be shortly stated. The plaintiff [*252] Mrs. Messer, who resides in Scotland, was entered in the register as proprietor in fee simple, free from incumbrances, of certain parcels of land in the district of Hamilton. In the year 1884 she was joined by her husband, who left behind him in the colony, in the custody of Charles James Cresswell, a solicitor of Hamilton, her duplicate certificates of title, and also a power of attorney, by which she had authorized her husband to sell, mortgage or otherwise dispose of the lands. During their absence from the colony Cresswell forged a transfer of the lands by Mr. Messer, as his wife's attorney, to "Hugh Cameron, of North Hamilton, county of Dundas, grazier." It is admitted that there was no such person as the transferee in existence. Cresswell then, representing himself to be agent for Hugh Cameron, produced the transfer, dated the 11th of August, 1885, along with Mrs. Messer's certificate of title to the registrar, who cancelled each folio in which her name was entered, registered Hugh Cameron as

proprietor upon a new folio, and issued the usual duplicate certificate in his name.

Still professing to act as agent for Hugh Cameron, Cresswell next arranged with the defendants, the McIntyres, for a loan of £3,000, to be secured by mortgage. He wrote, with his own hand, a deed of mortgage, bearing date the 10th of October, 1885, purporting to be executed by Cameron, he himself being the subscribing witness, whose attestation is required by the statute. Upon the faith of that document the McIntyres paid the money to Cresswell, who forthwith appropriated it to his own purposes. When they presented their mortgage for registration, the registrar declined to enter it until he was satisfied that the Hugh Cameron registered as proprietor was not identical with a person of the same name who had recently been made bankrupt. They accordingly obtained from Cresswell a statutory declaration, purporting to be sworn by his client Hugh Cameron before himself, as a Commissioner of the Supreme Court of the colony for taking affidavits, to the effect that the declarant had never been made insolvent, or taken the benefit of any Act relating to bankruptcy or insolvency. Upon production of that evidence the registrar duly entered a memorial of the mortgage in the folio containing Hugh Cameron's certificate of title. [*253] Mr. Messer returned to the colony in July, 1886, when these frauds were discovered, and Cresswell absconded, leaving no assets. The present suit was then brought by Mrs. Messer against (1) the registrar, (2) the McIntyres, as mortgagees of Hugh Cameron, and (3) Cresswell. It prays for an order for the calling in and cancellation of the certificates in name of Hugh Cameron, and also for the issue to the plaintiff of new certificates of title, free from the incumbrance of the McIntyres' mortgage, and alternatively, in the event of the mortgage being held to constitute a valid incumbrance upon her title, for a declaration that the plaintiff shall be at liberty to redeem, and that the moneys necessary therefor be paid by the registrar out of the assurance fund created by the Act.

It is clear that the registration of the name of Hugh Cameron, a fictitious and non-existing transferee, cannot impede the right of the true owner Mrs. Messer, who has been thereby defrauded, to have her name restored to the register. Accordingly, in the absence of Cresswell, who has not appeared to defend, the controversy between the litigant parties has been mainly, if not wholly, confined to the question whether the mortgage is or is not an incumbrance affecting Mrs. Messer's title. If the mortgage is valid, their Lordships see no reason to doubt that Mrs. Messer has been deprived of an interest in land, in consequence of fraud, within the meaning of Sec. 144, and that, failing recovery from Cresswell (against whom she has taken all the proceedings which the clause requires) she is entitled to receive the amount payable for its redemption out of the assurance fund. On the other hand, if the mortgage does not constitute an incumbrance upon the title, Mrs. Messer will obtain a full measure of relief, and can have no claim against the fund.

Webb, J:—The judge of the first instance sustained the validity of the mortgage, but ordered that the plaintiff should be at liberty to redeem, and that the defendant, the registrar, should pay to her, out of the assurance fund, her costs of the action, all moneys from time to time paid by her for interest in respect of the mortgage, and also all moneys necessarily paid by her for principal, interest and costs in order to its redemption. His decision was affirmed on appeal by the Full Court, with the [*254] variation that plaintiff was found liable in costs to the mortgagees, to be added to her own costs of suit, and repaid to her by the registrar out of the assurance fund. The registrar has appealed to this Board from the judgment of the Full Court. In the course of the argument it was maintained, on his behalf, that the protection given by the statute to proprietors of a mere interest in land, such as is created by a statutory mortgage, which does not operate as a transfer of

the legal estate, is less extensive than the protection afforded to proprietors of the land itself. Their Lordships do not find it necessary to determine that point, although, prima facie, it does appear to have been the intention of the Act to confer the same kind and degree of security upon all persons who, transacting in reliance on the register, acquire either proprietary rights or mere interests in land, in good faith and for valuable consideration. They assume, for the purpose of this case, that the statute, in that respect, makes no distinction between these two classes of proprietors; and that the McIntyres' mortgage is not liable to impeachment upon grounds which would have been unavailing against a transfer of the land obtained by them, in similar circumstances, from the same author.

Their Lordships do not propose to criticise in detail the various enactments of the statute relating to the validity of registered rights. The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. In the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificate of title, so long as he remained undivested by the issue of new certificates to a bona fide transferee, would have been liable to cancellation at the [*255] instance of Mrs. Messer ; but a mortgage executed by Cameron himself, in the knowledge of Cresswell's fraud, would have constituted a valid incumbrance in favour of a bona fide mortgagee. The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited

to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration. The difficulty which the mortgagees in this case have to encounter arises from the circumstance that Hugh Cameron was, as Mr. Justice Webb aptly describes him, a "myth." His was the only name on the register, and, having no existence, he could neither execute a transfer nor a mortgage. The mortgagees have endeavoured to surmount that difficulty by arguing that, in the circumstances of the case, Cresswell must be held to have been de jure, if not de facto, the proprietor whose name was on the register, and that their mortgage, executed by him in the name of Hugh Cameron, is, therefore, as valid as if Cresswell's own name had been on the register, and he, and not Cameron, had been the apparent mortgagor. That argument found favour with both courts below.

The views entertained by the learned judges have been very clearly explained by Mr. Justice A'Beckett, who, in delivering the judgment of the full bench, said :—"We, therefore, feel no doubt that the certificate of title on which the mortgagees advanced their money, though brought into existence by the forgery of the defendant Cresswell, was as efficacious in their favour as if it had issued upon an honest and regular transaction. That certificate described Hugh Cameron as the proprietor, and the mortgagees had the right to an indefeasible estate in the land mortgaged to them. It now appears that no such person as Mr. Hugh Cameron described in the certificate in fact existed; and the appellants [*256] contend that a mortgage purporting to be by this fictitious person, and affecting land alleged to be his, is a mortgage of a non-existent interest—a mere abstraction which cannot derogate from the rights of the true owner

—and that the mortgage is therefore worthless. This contention appears to us to be answered by the view put forward in the statement of claim inferentially admitted by the Registrar of Titles, and sustained by the evidence, that Charles James Cresswell had, for the purpose of dealing with this land, assumed the name of Hugh Cameron. It was he who signed the transfer to Hugh Cameron as transferee, and who signed the mortgage to the defendants McIntyre as mortgagor, and he produced the certificate of title of Hugh Cameron for the purpose of having the mortgage registered upon it. Upon these facts we think that, in favour of the mortgagees, he should be regarded as the proprietor of the land with whom they dealt, on the faith of the certificate evidencing his title."

The opinion thus expressed appears to recognize the principle that a mortgagee, advancing his money on the faith of the register, cannot get a good security for himself except by transacting with the person who, according to the register, is the proprietor having title to create the incumbrance. So far their Lordships agree; but they do not concur in the inferences which the learned judges have drawn from the facts in evidence, with respect to the position of Cresswell throughout these transactions, and his true relation to the name entered on the register as that of the proprietor. They are unable, upon the facts proved, to affirm that Cresswell "assumed" the name of Hugh Cameron for the purpose of dealing with Mrs. Messer's land. A man cannot, with any propriety, be said to assume a name, or in other words an alias, unless he acts personally under that name, or asserts it to be his own designation. Nothing could be further from Cresswell's purpose than his assumption of the name of Hugh Cameron; on the contrary, the mainspring of his fraudulent device consisted in representing Hugh Cameron to be a real person, a grazier, who had no connection with himself beyond that of an ordinary client. In pursuance of that device he professed to transact with the McIntyres in the capacity of [*257] Cameron's law agent, he attested what

purported to be Cameron's signature to their deed of mortgage, and he gave them a document, used by them in order to obtain registration of their right, which bore that Hugh Cameron had appeared personally before him, and had signed the document in his presence, after making oath to the verity of its contents. The McIntyres must, in these circumstances, have understood Cresswell and Hugh Cameron to be distinct individualities. They nowhere allege the contrary; and if they had even suspected that Hugh Cameron was only another name for Cresswell, they would not have been justified in completing the transaction without inquiry. The McIntyres cannot, therefore, as matter of fact, be held to have dealt on the faith of the certificate as evidencing the proprietary title of Cresswell.

The truth is that Hugh Cameron was in no sense an alias of Cresswell's but a fiction or puppet created by him, in order that it might appear to be an individual having a separate and independent existence. The reasoning of the learned judges fails to appreciate the difference between these two things. If Cresswell had, as they say he did, "assumed" the name of Hugh Cameron, and had used it fraudulently, he would not have been a forger. His fraud, in that case, would have been in the representation that Hugh Cameron was his own designation, and he would, no doubt, have been amenable to the criminal law, in respect of such fraud. But, in first registering a fictitious Hugh Cameron as proprietor of the land, and then executing and delivering a mortgage in the name of Hugh Cameron, Cresswell represented the mortgagor to be a person other than himself, and committed the crime of forgery. The real character of the criminal acts perpetrated by Cresswell differs in no respect from what it would have been had Hugh Cameron been a real person, whose name was put upon the register by him, and used by him in a forged deed creating an incumbrance.

Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, became the root of a valid title, in a bona fide

purchaser by force of the statute, there is no enactment which makes indefeasible the [*258] registered right of the transferee or mortgagee under a null deed. The McIntyres cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity. The result is unfortunate, but it is due to their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty. In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences.

Their Lordships will humbly advise Her Majesty to reverse both judgments below, and, in lieu thereof, (1) to declare that the mortgage purporting to be executed by Hugh Cameron to the defendants McIntyre, is invalid, and does not constitute an incumbrance upon the title of the plaintiff, Mrs. Messer; (2) to direct the defendant Richard Gibbs to cancel the two certificates of title issued in the name of Hugh Cameron and entered in folios 346,585 and 346,586 of the register book, vol. 1,733, and also the memorial of the said mortgage entered in these folios, and to substitute therefor two certificates of title, to the same lands respectively, in the name of the plaintiff; (3) to order the defendants McIntyre to pay to the plaintiff the costs of suit in both courts below; (4) to order the defendant Charles James Cresswell to pay to the defendant Richard Gibbs his costs in those courts, and here, and also to pay to the defendants McIntyre, all such costs, either incurred by them, or paid by them to the plaintiff as hereby provided. The defendants McIntyre must pay to the plaintiff, Mrs. Messer, her costs of this appeal.

Solicitors for the appellant:—Freshfields & Williams.

Solicitors for respondent Messer:—St. Barbe, Sladen & Wing.

Solicitors for respondents McIntyre:—Watson & Malleson.

PRIVY COUNCIL.] [L. R. 1893, A. C. 162.

JAMES (Defendant),

AND

STEVENSON AND OTHERS (Plaintiffs).

On appeal from the Supreme Court of Victoria (15 V. L. R. 615).

Victoria Transfer of Land Statute— Certificates — Easement— Evidence to show abandonment.

In an action by the respondents to assert a right of way which had been granted by the appellant's predecessor by deed in 1839 over his land, and along the boundary which divided land retained by him from land conveyed to the respondents' predecessor, the appellant pleaded that it had been abandoned :—

Held—That abandonment being a question of intention, non-user by the respondents, coupled with user by the appellant for farm purposes, of portions of land, subject to the easement, when the easement was not required, could not prove an abandonment of the entire right, and were inconclusive to prove an abandonment of portions thereof :

Held, that the omission on the appellant's and respondents' certificates of title to their respective lands under the Transfer of Land Statute to record the easement, did not bar the respondents' claim or relieve the servient-tenement of its liability.

Appeal from a decision of the Supreme Court (Dec. 2, 1889) and from a judgment entered for the respondents in pursuance thereof by Williams, J. (Dec. 18, 1889).

The facts are stated in the judgment of their Lordships .

Finlay, Q.C., and Tindal Atkinson, for the appellant, contended that on the evidence the right of way claimed was not proved to exist on the parcel of land in dispute. Even if the easement is held to have been created, it has been extinguished by abandonment, and by various acts of the respondents and their predecessors in title. The respondents' rights, moreover, are concluded by the certificates of title respectively issued to them and to the appellant under the Transfer of Land Statute, both of

Present :—Lord Hobhouse, Lord Macnaghten, Lord Hannen, Lord Shand, Sir Richard Couch, and Sir Edward Fry.

which are silent as to the alleged easement; whereas, if [*163] the easement had continued to exist at the date of those certificates it ought to have been, and would have been, therein. See Secs. 47, 49, 50 of number 301 to Act 42 Vic. No. 610, and 49 Vic. No. 872, s. 41. Reference was made to Scott v. Shire of Eltham ;[1] Small v. Glen.[2]

W. Graham (with him Sir Horace Davey Q.C.), for the respondents, contended that their title to the right of way was established by the evidence. Its position and the position of the ground over which such right of way existed was determined by long user thereof by the respondents and their predecessors in title. The certificates of title, at least, showed the boundaries of the lands respectively belonging to either party. The appellant, therefore, could not dispute that the position of the way claimed by the respondents was on their western boundary and on his eastern. Though the certificates were silent as to the right claimed and the incumbrance imposed, there was nothing in the Transfer of Land Statute and its amending Acts to bar or extinguish the respondents' claim, or to render the silence of the certificates conclusive on the subject. The way was never made as a road. Though there was evidence that the respondents had not in earlier years used the way, that was because there was no necessity to use it. On rare occasions, when its use was required, it was not abandoned. Since 1875 there had been open user in assertion of right. The evidence entirely failed to prove any possession or enjoyment by the appellant, adverse to such user, or any intention on the part of the respondents to abandon their claim. Abandonment is a question of intention, to be decided on the particular facts. See Crossley & Sons, Limited v. Lightowler.[3]

Atkinson replied.

The judgment of their Lordships was delivered by :—

[1] 2 Vic. L. R. (L.) 154.

[2] 6 Vic. L. R. (L.) 98.

[3] L. R. 3 Eq. 279; S. C. 2 Ch. 478.

SIR EDWARD FRY :—

The respondents are the owners and occupiers of a piece of land, part of a Crown grant, portion No. 1, in the parish of [*164] Keelbundora, county of Bourke, in the colony of Victoria. They were plaintiffs in the action. The appellant, who was the defendant, is the owner of a piece of land adjoining the plaintiff's land to the west, which was included in the same Crown grant. The action was brought to assert a right to a way along the western side of the boundary, which divides the lands of the litigant parties.

The Crown grant, under which both parties claim, bore date the 31st of January, 1839, and was made to Thomas Walker. The land granted was bounded on the south by the Yarra Yarra river; on the west by a creek known as Darebin creek; on the north by a section line, dividing portion No. 1 from portion No. 3; and on the east by a similar line dividing portion No. 1 from portion No. 2.

By indentures of lease and release, bearing date respectively the 7th and 8th of June, 1839, the Crown grantee, Thomas Walker, conveyed to George Brunswick Smyth, the predecessor in title of the plaintiff, a part of the same portion No. 1. It was described as bounded on the east by the original eastern boundary of this portion, being a line commencing at the Yarra Yarra river, and running 132 chains in a northerly direction; on the north by the marked sectional line bearing west 29 chains from the north-eastern point; on the west by a line of road, 1 chain in width, "the use of which," says the release, "is hereby also released and conveyed," and bearing south from the south-western point to the Yarra Yarra river; and on the south by that river. The deed further describes the land as "containing by admeasurement in or about 374½ acres, be the same more or less." Then follows a grant of the road before mentioned, in these words: "and a right of road or way, 1 chain in breadth, in, through, and out of the same, and commencing at or about the north-western point of the said portion of land hereby released, or intended so to be, and

running in a southerly direction to the Yarra Yarra river." The plan on the deed, which is referred to in the grants as containing a more particular description and delineation of the property granted, shows distinctly a road leading from the Yarra Yarra river to [*165] the north-west point of the land conveyed, along the western boundary of that land, but on the land retained by the vendor, Thomas Walker. On the plan the road is marked "reserved road," which is, no doubt, inappropriate language; and the words "in, throug, and out of the same," contained in the description of the road in the release, are not very intelligible; but no doubt exists in their Lordships' minds as to the effect of the deed as a grant by Walker to Smyth of a right of road over the land retained by Walker along its eastern boundary.

It should be added that the release further reserved to Walker a right of way across the land released, in a direction east and west; this way was subsequently dedicated to the public, and is known as the Lower Heidelberg Road.

The plaintiffs claim under Smyth, the grantee of the right of way; the defendant claims under Walker, the grantor.

It is the common case of both parties that, at the date of the release of 1839, there was no fence existing between the land conveyed to Smyth and the land retained by Walker.

When this action was begun in the year 1888, and when the trial took place, the condition of the properties was as follows: They were intersected by several public roads; first, beginning towards the south by the Lower Heidelberg Road, running in a general east and west direction along the line of the way reserved by the release of 1839; next, by the Melbourne and Heidelberg Railway, running from S.W. to N.E.; next, by the upper Heidelberg Road, having a general direction of S.W. to N.E.; and, lastly, by a road to Eltham with a somewhat more northerly trend; the northern boundary of the plot

was then skirted by a public road known as Banksia Road.

Except where these public roads intervened the whole western side of the plaintiffs' land was divided from the defendant's land by an ancient wooden fence, which was shown to have been there as long ago as the year 1842, which extended from the Yarra Yarra river to the north-west corner of the land in Banksia Road. Along this western fence from the Yarra Yarra river northward to the Lower Heidelberg Road there was no visible track, nor was any user of a road there shown, except upon one occasion when the plaintiffs' predecessor was doing [*166] repairs to the fence ; but at the north-west corner of the defendant's land in the Lower Heidelberg Road there was a gate which, so far as appears, was ordinarily left open. From the Lower Heidelberg Road northward, as far as the Eltham Road, along the eastern side of the defendant's land, and by the side of the ancient fence, there was a road which appears to have been in existence as far back as the evidence goes, and to have been used as a private road by the plaintiffs and their predecessors. From the Eltham Road northward to Banksia Road no track existed : no gates are shown to have been inserted in the fences, which were wooden ones, and no user is shown.

The right of the plaintiffs to use the private road between the Lower Heidelberg Road and the Eltham Road is not in question : the dispute relates to rights of way claimed over the pieces of land respectively south and north of this private way, and in direct continuation of it.

It was in the first place contended that the true western boundary of the land conveyed to Smyth in 1839 was different from the existing line of fence; that the real line of division began on the north-west corner, at a point to the west of the end of the actual fence, and terminated at the south-west corner on the river at a point considerably east of the southern end of the existing fence, from which it was contended that the

way claimed was essentially different from the way granted.

But it is to be observed that the existing fence has been in its present situation for upwards of forty years; that no legal origin can be shown to this fence, except the boundary drawn by the release of 1839; that in like manner the private road between the Lower Heidelberg and the Eltham public roads runs along the side of this wooden fence; that no legal origin can be shown to this road, except the grant of a right of way contained in the same deed, and that the possession and enjoyment of the lands of the plaintiffs and defendants are, at the present time, and have probably since 1839, or very soon after, been determined and regulated by the existing fence. In such circumstances there arises, in the judgment of their Lordships, a very cogent presumption in favour of the existing fence being on the line [*167] intended and expressed by the deed of conveyance by the predecessors in title of the defendant to the predecessors in title of the plaintiffs—a presumption not to be displaced, if at all, unless by the most conclusive evidence of error in the actual position of the fence. In the present case their Lordships are not convinced that there is any such error; the eastern fence, as it actually existed, is stated in the evidence to have been "a little wavy" in its course, but in the plan which is set forward as demonstrating the error it is a straight line; the deed of 1839 describes the eastern boundary as running 132 chains in a northerly direction, the plan above mentioned draws it northwards 180.01 chains. In the deed the northern boundary is described as bearing west—language which does not necessitate its being drawn due west. In the plan used to demonstrate the error, a distance of twenty-nine chains on a somewhat arched line is measured from a point near the south-eastern corner of the plot to ascertain the western boundary on the Yarra Yarra river, and there is nothing which appears to justify this particular method of measurement. Lastly, it is not shown whether the plot bounded by the line now put forward as the true one

has precisely the same limits on the Yarra Yarra river as are indicated on the original release, nor whether it includes the 374½ acres mentioned in the release of 1839, or more or less than that quantity. In their Lordships' opinion the presumption that the existing fence is the true boundary of the properties, according to the rights of the parties as ascertained by the release of 1839, is not rebutted, and consequently they are of opinion that the way claimed by the plaintiffs is along the strip of land subjected to the easement by that deed.

It has, in the next place, been contended at the bar, that the right of way has been abandoned. This is a question of intention to be decided upon the facts of each particular case, as was expressly laid down in the case of Crossley & Sons v. Lightowler.[1] There can be no question of the abandonment of the entire right of way granted in 1839, because an important part of it has been and is used by the plaintiffs without disturbance; the only question can be, whether the northern and southern [*168] continuations of that road have been abandoned. Now, the only facts which can be relied on by the defendant in the present case are the absence of user of the northern part of the way; the absence of gates in the fences of that part of the land; the absence of user of the southern right of way by the plaintiffs and their predecessors, except on one occasion in 1872, when it appears that materials for the repair of the fence were carted under the direction of the agent of Stevenson, a predecessor of the plaintiffs, through the gate in the Lower Heidelberg Road, and down the west side of the fence; and the user by the defendant and his predecessors, for farm purposes, of the portions of the land over which the roads in question would pass. But these facts are, in their Lordships' judgment, insufficient to show any intention to abandon the right of way. It does not appear that occupants of the plaintiff's land have ever had any occasion to use the northern part of the way, or the southern part, except once, and then they did so use it; and to have required gates to be inserted

[1] L. R. 2 Ch. 478.

in the wooden fence at Banksia Road and the road to Eltham, when the way was not wanted for use, would have been an unreasonable act, the omission of which cannot be construed as the expression of an intention to abandon the right of way. Nor is the occupation for agricultural purposes of the strips of land subject to the easement, when the easement was not wanted, in the opinion of their Lordships, a conclusive circumstance. It is worthy of notice, in reference to this question of abandonment, that ever since the year 1875 the plaintiffs have distinctly asserted their right to the way which they now claim, and if in the earlier period there is no evidence of such assertion, it must not be forgotten that it is one thing not to assert an intention to use a way and another thing to assert an intention to abandon it.

Lastly, a contention was raised by the defendant, based upon the provisions of the Transfer of Land Statute. On the 27th of March, 1886, two certificates of title under that statute were issued to the defendant in respect of portions of his land in question, and contained no notice of any right of way over any part of this land. On the 5th of June, 1888, two certificates of title were isued to the plaintiffs, which stated their right [*169] over the private road between the Lower Heidelberg and Eltham Roads, but were silent as to any rights of way to the north and south of this private road. It is contended that the legal effect of these certificates was to extinguish the plaintiffs' right of way, if it ever existed. This contention is, in their Lordships' judgment, untenable. The 49th section of the Transfer of Land Statute provides that land included in any certificate of title shall be deemed to be subject to any easement subsisting over it. The subsequent legislation on the subject has not, in their Lordships' judgment, interfered with this provision. The Amending Act, No. 610, by section 2, makes a certificate of title, which certifies that the person named therein is entitled to an easement, conclusive evidence that he is so entitled ; but it does not make such certificate the only evidence admis-

sible. The 41st section of the subsequent amending Act, No. 872, requires the registrar to specify upon the certificate as an incumbrance affecting the land included in it any subsisting easement affecting the same which shall appear to have been created by deed or writing; but their Lordships agree with the judgment of the full Court of Victoria, that "the omission by the registrar to enter the easement as an incumbrance on the certificate of the servient tenement under this provision, would not relieve the servient tenement of its liability." In like manner the omission of the registrar to state on the certificates granted to the plaintiffs the existence of the rights of way they claim is no bar to that claim.

These observations dispose of all the points presented to their Lordships at the bar, and for the reasons given they will humbly advise Her Majesty that this appeal be dismissed with costs.

Solicitors for appellant :—Crawford & Chester.

Solicitor for respondents : —J. Harwood.

PRIVY COUNCIL,* 1890.] [L. R. 15 A. C. 195.

MANNING Appellant.

AND

THE COMMISSIONER OF TITLES, Respondent.

On appeal from the Supreme Court of Western Australia.

Law of Western Australia—Transfer of Land Act, 1874, ss. 19, 21, 120—Absence of Caveat—Power of Commissioner to refuse Registration.

Held—That according to the true construction of Secs. 19 and 21 of the Transfer of Land Act, 1874, the commissioner is not bound to register title merely by reason of the issue of the prescribed notices and the non-appearance of a caveat. Such notices may produce information, and the commissioner, in consequence thereof

* Present :—Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Morris, and Sir Barnes Peacock.

or of reconsideration, has a discretion to refuse to register; subject to the opinion of the Supreme Court under Sec. 120.

Appeal from a judgment of the Supreme Court (Dec. 16, 1887), on a case stated by the respondent under section 12 of the Transfer of Land Act, 1874, for the opinion of the Supreme Court.

[*196.] The facts, the special case, and the material sections of the Act are stated in the judgment of their Lordships.

The question for decision in the appeal was, whether the respondent had power under the Act of 1874, after he has intimated to an applicant for registration under that Act that his title is fairly made out and after the advertisements required by the Act have been issued, and when no caveat forbidding registration has been lodged, to reject the application and refuse registration.

The acting Chief Justice decided that he could; Stone, J., that he could not. The judgment was in accordance with the opinion of the former.

That opinion was, so far as is material, that if the application of the applicant to be registered as the owner should be conceded, it must be conceded on a very rigid and, indeed, strained construction of section 12; that to place the Court in a position to do justice between all parties every particle of documentary evidence in possession of the respondent or the appellant should be produced to the Court, and that the case should be stated not merely under section 12, but under section 120; that if the appellant's application were bonâ fide, documentary evidence would be produced to support it; if it were malâ fide, then so much the greater would be the necessity for such production, and the injury done to the real owner by admitting the appellant's claim would be all the more deplorable if the Supreme Court should allow itself to be the instrument of such injury; that the facts, real or supposed, which had induced the respondent to stay his hand in issuing the certificate of title, would be available in his

hands for the cancellation of the certificate the moment after it had issued, and should, therefore, be available for the same purpose before it had issued—that the Act was a weapon of defence, not of offence, and must not by an adherence to the words and rejection of its substance be used to deprive a proprietor of his rights, and that the appellant had not made out his case.

Stone, J., on the other hand, was of opinion that the respondent had done all he was required to do; that the Statute gave him no power to rescind his direction and reject a title after having once approved of it; that the 19th and 21st sections of the Act [*187] were imperative on the registrar to register, unless a caveat was lodged; that it was of the utmost importance, as the Statute then stood, that the commissioner should not give directions for the notices to be advertised until he had perfectly satisfied himself as to the state of the applicant's title; that after such action he had, in fact, judicially decided in favour of the title, and could not recall that decision, except upon the ground that it was obtained by fraud, and he was inclined to doubt whether, even upon that ground, he could alter his decision.

Rowlands, Q.C., and Cowell, for the appellant, contended that the commissioner's power to reject an application and refuse registration can only be exercised in the first instance. After he has ruled that the applicant's title is prima facie a good one, and has directed the publication of notices, an adverse decision upon the applicant's title can only be come to by the Court on a contestation duly raised by a caveator entering an opposition as a responsible litigant. Failing a caveat, the order, which originally has the effect of an order nisi, becomes an absolute order, which can only be set aside on a sufficient case being made to the satisfaction of the Court. The case was brought on by consent under section 12, and raised the question of the power of the commissioner to act as stated in the special case. The act was examined to shew that it was the intention of the Legislature that, as soon as a

prima facie case of title by adverse possession was made out, the procedure prescribed for disputing it was by litigation in open Court, founded on a caveat or direct application, under which the Court could exercise its jurisdiction, and hear and determine the question as a matter in litigation before it. The commissioner could not by entertaining applications and listening to information or evidence behind the back of the original applicant, make an order in prejudice of his prima facie title, on the face of which he had incurred the expense of publication and other costs imposed by the Act.

Rigby, Q.C., and J. B. Wood, for the respondent, contended that he had never finally declared his approval of the appellant's title. There was nothing in the Act to require him finally to [*198] approve the title before directing advertisements and notices to be published. Such publication is no evidence of the title having been approved. There was nothing in the Act to deprive the commissioner of the power and duty given or implied by the Act to make investigation at any time before final order of registration. The provision in the Act for the lodging of a caveat by the registrar is directory only. It is mere machinery, and does not prevent the commissioner from otherwise forbidding the registration of a title not established to his satisfaction. The appellant had not made out his title to the satisfaction of the respondent, and no information was given by the special case as to what his title was. Accordingly, he had not made out his claim to be registered under the Act.

Rowlands, Q.C., replied.

The judgment of their Lordships was delivered by LORD HOBHOUSE :—

The appellant claims that her predecessor in title, L. A. Manning, was in a position which entitled him to call upon the respondent to register his title under the Transfer of Land Act 1874. The respondent denies that, and on a special case stated by him under Sec. 12 of the

Act for the opinion of the Supreme Court, judgment has been given in his favour. The Court, consisting of two judges, was divided in opinion, and the judgment is in accordance with the opinion of the Chief Justice.

The question turns on the construction of the 19th and 21st sections of the Act, which it will be convenient here to set out:—

"19. If it shall appear to the commissioner that any such transaction as aforesaid has been registered, and that all encumbrances affecting the land (excepting such as are hereinafter mentioned as not requiring special notification) have been released, or that the owners thereof have consented to the application, or that an encumbrance (not being a mortgage, the owners whereof shall not have consented to the application) may be specified in the certificate of title, and continue outstanding, the commissioner shall direct notice of the application to be [*199] advertised once at least, in one newspaper published in the city of Perth, or circulating in the neighborhood of the land, and to be served on any persons named by him, and shall appoint a time, not less than fourteen days, nor more than twelve months from such notice, or from the advertisement, or the first of such advertisements, if more than one, on or after the expiration of which the registrar shall, unless a caveat shall be served forbidding the same, bring the land under the operation of this Act.

"21. If before the expiration of the time limited in the notice aforesaid for lodging a caveat the registrar shall not have received a caveat forbidding the bringing of the land in question under the operation of the Act, he shall bring such land under this Act by registering in the name of the applicant, or in the name of such person as may have been directed in that behalf, a certificate of title to such land in the form in the second schedule hereto."

The material facts are as follows: Manning having applied on the 25th of July, 1887, to be registered as the proprietor of a certain location by virtue of posses-

sion, the commissioner made requisitions on his title which were answered by his solicitors. On the 8th of August the commissioner stated that he considered the title fairly made out, and that he should advertise. He advertised according to Sec. 19, and fixed the 29th of October as the last day for entering caveats. No caveat was entered; but, in the language of the special case, "on the 24th of October the commissioner forwarded to the solicitors for the applicant a declaration and certain depositions on oath which he had taken without notice to the applicant, and which tended to throw doubt on the applicant's possession."

On the 28th of October the commissioner formally notified to the solicitors that the application was rejected. The course then taken by the solicitors and the commissioner is thus stated in the special case.

"7. The applicant's solicitors consider the rejection is beyond the power of the commissioner, and contend that the commissioner having once expressed himself satisfied with the title as proved by the applicant, and having advertised under Secs. 19 and 20 of [*200] the Act, and no caveat having been entered, his power to reject is gone, and it is imperative upon the registrar, under Sec. 21 and the general scope of the Act, to bring the land under the Act by registering the same in the name of the applicant.

"8. A formal application to the registrar to perform his duty in this respect has been made, but he, relying upon the fact 'that the application had been rejected by the commissioner, who was not prepared to sign a certificate of title,' refused to register."

Upon these facts the commissioner stated the special case, in which Manning's solicitors concurred, and which was heard with the result above mentioned. Nothing was stated to show the nature of Manning's title except that it rested on possession, or the nature of the evidence against it except that it brought the allegation of possession into doubt. The next question raised by the case, and argued in the Supreme Court and here, is whether on the 8th of August, 1887, the commissioner

and the registrar became mere machines for registration in case no caveat should be lodged.

It must be admitted that the strict literal construction of the sections above set forth is in favour of the appellant's view. But the whole purview of the Act must be looked at. We find that the commissioner is to be a lawyer of seven years' standing and practice, and that, amongst other things, he is to investigate applications for bringing the land under the provisions of the Act. And it is very important to see what is the language of the Act with regard to the applications which the commissioner is expected to investigate.

Sec. 17 says that land alienated in fee by the Crown before the Act may be brought under the operation of the Act by an application made by, among other persons, the person claiming to be owner of the fee simple either at law or in equity. Sec. 18 says that the registrar shall submit the application to the commissioner for his direction. Then Secs. 18 and 19 go on to deal with properties which are found differently circumstanced.

If the commissioner finds that no transaction affecting the land has been registered under any general Act, Sec. 18 says that: "he shall direct the registrar to bring the land under the [*201] operation of this Act by registering a certificate of title." According to the literal force of Secs. 17 and 18, any person may appear claiming to be the owner of land alienated in fee by the Crown, and if there has been no previous registration the commissioner has absolutely nothing to do but to direct the registrar to enter a certificate of title. It is felt by all that such a conclusion is irrational, and the appellant's counsel do not contend for it. They admit that the commissioner must have some power of inquiry, and some discretion to accept or reject an application. But they cannot point to any words of the Act which expressly confer those powers upon him.

As regards Sec. 18, then, it is not disputed that the commissioner is an official bound to exercise his intelligence, and not a mere machine, as the literal force of

the words would make him. Now when we have once reached the conclusion that such a meaning must be read into Sec. 18, we cannot refuse to read it into Sec. 19, and then it is for those who insist on his mechanical action to show at what point his discretion ceases and his obligation to follow a rigid rule begins.

It is not contended that the Act anywhere defines this point, or that it orders the commissioner to sign a certificate of title except so far as such an order may be implied by the direction to the registrar in Sec. 21. The appellant's counsel contend that in a case falling within Sec. 19, the discretion of the commissioner is at an end when he has decided to advertise and serve notices. By that time, they argue, he must be taken to have completed his investigations, and, in fact, in this case he did intimate to the applicant's solicitors that the title had been fairly made out. But it appears to their Lordships that the investigations cannot be complete until it is seen what the notices produce. They may not necessarily produce caveats, for those can only be lodged by persons making claims on their own behalf, but that may produce information showing that registration of the applicant would not be right. If a certificate of title is issued in error, the commissioner may, under Sec. 117, take steps to cancel it. Supposing then, that before certificate, the commissioner finds, either from fresh information or on reconsideration, that he is in error, what is he to do ? The [*202] appellant's counsel contend that, if he has issued notices and there is no caveat, he must give the certificate and then take steps to cancel it. It seems to their Lordships that such a course is not rational and is not obligatory under the Act, but that the proper course in such a case is to refuse the certificate.

The applicant is not without remedy in such a case. If the commissioner exercises his discretion wrongfully or erroneously, the applicant may, under Sec. 120, first require him to set forth his reasons, and then summon him before the Supreme Court to maintain his case. In that proceeding the whole substance of the case may

be thoroughly examined. Here the applicant has not chosen to take that course, but has preferred to insist that the commissioner is bound, by the issue of notices on the 8th of October, and by the non-appearance of any caveat, to register the claim of title. As the applicant fails in that contention, this appeal must be dismissed and with costs.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Solicitor for appellant :—W. H. Herbert.

Solicitors for respondent :—Sutton & Ommaney.

PRIVY COUNCIL,* 1883.] [L. R. 8 A. C. 314.

THOMAS EDWARD McELLISTER AND OTHERS, Defendants.

AND

WILLIAM BIGGS AND OTHERS, Plaintiffs.

On appeal from the Supreme Court of South Australia.

South Australian Act 22 of 1861. s. 28—Unregistered Deed may pass an Equitable right.

Although an unregistered deed is not effectual to pass any interest in land under Sec. 39 of Act 22 of 1861, yet it is effectual to pass an equitable right to set aside a certificate of title relating thereto which has been obtained by fraud.

Appeal from an order of the Supreme Court (July 27, 1880) dismissing an appeal from Gwynne, J., Primary Judge in Equity (Dec. 10, 1879). The facts of the case appear in the judgment of their Lordships. H. Matthews, Q.C., and Strangways, for the appellants. Davey, Q.C., and Hull, for the respondents, were not called on.

The judgment of their Lordships was delivered by:
SIR BARNES PEACOCK :—

This is an appeal from a decree of the Supreme Court of South Australia which affirmed the decree of the

*Present :—Lord Blackburn, Sir Barnes Peacock, Sir Robert P. Collier, Sir Richard Couch, and Sir Arthur Hobhouse.

Primary Judge of the same Court, in Equity, in a suit in which William Biggs and others were the plaintiffs and Thomas Edward McEllister and others were the defendants. The decree of the first Court was that Edward McEllister, under whom the defendants claim, not as purchasers or for valuable consideration, became registered [*315] proprietor of the allotment No. 23, through fraud within the meaning of the Real Property Act, 1861, and that the certificates of the title registered in respect of that lot "were and are fraudulent and void as against George Guthrie and those claiming under him, and ought to be cancelled so far as regards the said allotment, except McKew's piece in the pleadings mentioned."

The Primary Judge also decreed that the plaintiffs were entitled to the said allotment No. 23, except McKew's piece, and that "The certificates of title be delivered up to be cancelled and be cancelled accordingly; that the registration and entry in the said register book of the said transfer of the said allotment from Thomas Greaves Waterhouse and George Turline, in the pleadings mentioned, to the defendants, Thomas Edward McEllister, Robert McEllister, and Susan Mary Gleeson, be cancelled; that the Registrar-General of the said province cancel the said certificates of title and each of them, and the said registration and entry of the said transfer in the said register book; that the defendants be restrained by the order or injunction of this honorable Court from transferring, mortgaging, charging, encumbering, or otherwise dealing with, or joining or concurring in transferring, mortgaging, charging, encumbering, or otherwise dealing with, the said allotment No. 23, except McKew's piece or any part thereof."

Both the lower Courts have delivered very clear and elaborate judgments, and it is unnecessary for their Lordships to reiterate the facts which are stated by the judges of those Courts. They have found that Edward McEllister obtained the certificate of title as to lot 23, except as regards McKew's piece, by fraud. There are concurrent judgments upon that point, and their Lord-

ships think that those judgments were warranted by the evidence. Guthrie obtained a judgment in ejectment against McEllister. Sec. 137 of the Colonial Act 22 of 1861, enacts that "upon the recovery of any land, estate or interest, by any proceeding at law or in equity from the person registered as proprietor thereof, it shall be lawful for the court or judge, in any case in which the proceeding is not hereinbefore expressly barred, to direct the Registrar-General to cancel any certificate of title or other [*316] instrument or any entry or memorial in the register book relating to such land, and to substitute such certificate of title or entry as the circumstances of the case may require; and the Registrar-General shall give effect to such order." The First Court, as already stated, upon the recovery in ejectment, ordered the certificate of title to McEllister as to lot No. 23, with the exception of McKew's piece, to be cancelled.

It was contended on the part of the appellants that the deeds under which the plaintiffs derived title from Guthrie, not having been registered in pursuance of Sec. 39 of the Act to which allusion has already been made, passed no interest in the lands. That section enacts that "no instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the estate or interest specified in such instrument shall pass." Their Lordships are of opinion that although the deed did not pass an interest in the land, still they passed to the plaintiffs the equitable right which Guthrie had to set aside the certificate of title to McEllister upon the ground of fraud. By Sec. 114 it was provided that "Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to enquire or ascertain the circumstances in or the consideration for which such registered owner, or any pre-

vious registered owner of the estate or interest in question, is or was registered." But the case of fraud is excepted, and fraud has been found by both the courts upon the evidence before them. Then it was contended that the plaintiffs did not come under clause 4 of Sec. 124. That clause enacts that "no action of ejectment or other action for the recovery of any land shall lie or be sustained against the registered proprietor under the provisions of this Act for the estate or interest in respect to which he is so registered, except in any of the following cases." Then one of the cases excepted is, "The case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud." Guthrie was a person who fell within [*317] that exception, and he therefore had a right to maintain the action of ejectment. Their Lordships are of opinion that by reason of that judgment, the equitable right to rely upon which has been transferred to the present plaintiffs, they had a right to come into Court and ask to have the certificate of McEllister set aside upon the ground of fraud; and the Courts below, having found fraud, were right in decreeing for the plaintiffs that the certificate should be set aside.

A further objection was made by the learned counsel for the appellants to the form of decree, which orders the certificates of title to be delivered up to be cancelled and to be cancelled accordingly, but does not order the Registrar-General to substitute such certificate of title or entry as the circumstances of the case might require. Sec. 137 says, "Upon the recovery of any land, estate, or interest, by any proceeding at law or in equity from the person registered as proprietor thereof, it shall be lawful for the Court or Judge, in any case in which such proceeding is not hereinbefore expressly barred, to direct the Registrar-General to cancel any certificate of title or other instrument, or any entry or memorial in the register book relating to such land, and to substitute such certificate of title or entry as the circumstances of the case may require, and the Registrar-General shall give effect to such order." If when

the decree of the Primary Judge was pronounced the objection had been made, the decree might have been rectified, but no such objection was then made, nor was it made on the appeal. Their Lordships, therefore, think that it is now too late for the appellants to object to the form of the decree. When the decree is carried out and the certificates are delivered up to the Registrar-General to be cancelled, and are cancelled accordingly, an application may be made to the Registrar-General to obtain the proper certificate of title. Under these circumstances, their Lordships think that the judgment of the Supreme Court was correct, and they will humbly advise Her Majesty to affirm that judgment. The appellants must pay the costs of this appeal.

Solicitor for appellants :—O. E. Dawson.

Solicitors for respondents :—Johnston, Farquhar & Leach.

PRIVY COUNCIL,* 1879.] [L. R. 4 A. C. 391.
[IN LOWER COURTS, 2 V. L. R. (E) 206;
3 V. L. R. (E) 61:
4 V. L. R. (E) 173.

NATIONAL BANK OF AUSTRALIA (Defendant), Appellant.

AND

THE UNITED HAND-IN-HAND AND BAND OF HOPE COMPANY, REGISTERED (Plaintiff) AND LAKELAND, (Defendant), Respondents.

Consolidated Appeals

On appeal from the Supreme Court of Victoria.

Mortgagor and Mortgagee—Decree for Redemption where Bill impeached the Mortgage and did not pray to redeem—Liability of Mortgagee in Possession—Costs—Registration—Victoria Transfer of Land Statute, s. 83, et seq.

Although a mortgagor is not entitled to a decree for redemption on a bill which impeaches the mortgage securities and contains no prayer for redemption; yet such rule does not apply where the

*Present :—Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

issue disclosed by the pleadings are not merely mortgage or no mortgage, but whether the defendant by means of his acts subsequent to the impeached mortgage had ceased to be mortgagee and had become absolute owner, and also whether the mortgagee's advances on the footing of the mortgage had not been more than satisfied by his receipts, the bill praying for an account, and offering to allow to the mortgagee all just credits.

A purchase by a mortgagee of mortgaged property, sold either under the power of sale or in execution of a decree against the mortgagor company (obtained collusively between the mortgagee and the directors) does not operate to vest an absolute title in the mortgagee.

Where the mortgagor is a registered owner of leasehold estate in Victoria (under Transfer of Land Statute), and the mortgage is made and registered under Sec. 83 and following sections, so that the only way in which the mortgagee can extinguish the rights of the mortgagor is by foreclosure under 31 Vic. No. 317, or sale under Secs. 84, 85 and 87 of the Transfer of Land Statute; then whether a sale of such leasehold estate is made by the mortgagee under the statutory power of sale, or as absolute owner, no interest therein passes to the purchaser until registration; see ss. 42 and 87.

A mortgagee is accountable, not merely for his actual receipts whilst in possession of the mortgaged property, but also for whatever is received by [*392] those to whom he transfers possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor.

A mortgagee in possession is not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him, unless by setting up a title adverse to the mortgagor he has lost the immunities of an ordinary mortgagee.

A mortgagee is chargeable with the full value of the mortgaged property sold if, from want of due care and diligence, it has been sold at an under value.

A mortgagee who in a redemption suit sets up and fails to prove an absolute title to the mortgaged property, and is then found to have been, at the date of suit, overpaid as mortgagee will not only not be allowed his costs of suit but may have costs given against him.

Appeals from two orders of the Supreme Court of Victoria (May 3, 1877, and Sept. 30, 1878).

The questions decided in these appeals are as to the right of the respondent company, under the circumstances stated in their Lordships' judgment, to impeach a sale made to the appellant bank, and to redeem their mortgage; and also as to the terms upon which such redemption should be allowed.

The material facts of the case out of which the suit arose are stated in the judgment of their Lordships. For reports of the proceedings in the Courts below, see 2 Vic. L.R. Eq. 206; Ibid. vol. III. 61; Ibid. vol. IV. 173.

On the 10th May, 1876, the respondent company filed a bill in equity against the appellant and William Lakeland, which after mentioning the mortgages of the 23rd of February and the 11th of March, 1873, more particularly described in their Lordships' judgment, contained allegations to the following effect :—

(Par. 10.) That no money was advanced by the bank to the company on the execution of the mortgages; that the seal of the bank was attached to those securities collusively and without lawful authority, and that in fact they were securities for former advances only.

(Pars. 11 to 15.) That in July, 1874, the directors of the company without authority arranged with the bank for a sale by the sheriff of the property comprised in those securities under a fi. fa.; that a clerk of the solicitor of the bank, as indorsee of a promissory note of the company, brought an action on the note against the company ; that the directors allowed judgment to be [*393] obtained by default, and that the sheriff with the concurrence or at the request of the directors acting in collusion with the bank, sold the whole of the property (subject to the mortgages) to Mr. H. Cuthbert, the solicitor of the bank, who in fact purchased on behalf of the bank.

(Pars. 16 to 21.) That Cuthbert shortly afterwards sold his interest in the property to two directors of the respondent company, on behalf of a new company, formed and incorporated as the United Hand and Band Company (no liability), who took possession.

(Pars. 22 to 27.) That in February, 1875, the bank assuming to act in exercise of the powers of sale in their securities sold the property to Messrs. Davey Brothers ; that the said Davey Brothers in fact purchased on behalf of the bank, who went into possession and carried on mining operations, but in a negligent manner ; that in March, 1875, all the interests of the new company was sold under a fi. fa. to one John Hardy, who assigned all his interest to the bank.

(Par. 32.) That in August, 1875, the bank (as above mentioned) sold the property to the respondent Lakeland for £6,000, which the bill alleged to be considerably less than the value.

(Par. 36.) That at the time Lakeland purchased the property he had notice of the several matters thereinbefore set forth, and of the rights of the respondent company.

And the bill sought to set aside as fraudulent and void the purchase by the bank through Cuthbert, its solicitor, of the property in question, and all subsequent dealings therewith, and to have the same delivered to the respondent company, and to make the bank and the respondent Lakeland, or one of them, liable for all gold, or proceeds of gold received by them, or either of them, from the mine (charging the bank with wilful default) and also liable for loss by negligent working, subject to the allowance of all sums properly expended in working. The bill offered to allow to the appellant all just credits but contained no offer to redeem.

The appellant bank, on the 13th of July, 1876, filed an answer, and thereby stated that it advanced £10,000 to the plaintiff company on the 7th of February, 1873, on its agreement to secure that sum by mortgage, and a further sum of £3,000 on the 25th [*394] of Nov., 1873, denied all collusion with the directors of the plaintiff company, claimed to be absolutely entitled to the mortgaged property, and denied its liability to account.

The respondent, William Lakeland, on the 21st of July, 1876, filed his answer, and thereby raised substantially the same points as were raised by the appellant.

On the 6th of December, 1876, Mr. Justice Molesworth decreed: (1) That the indentures of the 22nd of February, 1873, and the 11th of March, 1873, should be regarded as good securities for the amount owing from the Company to the bank; (2) That the Company was entitled to redeem the lease comprised in the mortgage of the 11th March, 1873; (3) That the sale by the sheriff to Cuthbert was void as against the company,

and that the bank had no title under the sale as against the company to bar the equity of redemption ; (4) That the sale to Messrs. Davey Brothers was void as against the company ; (5) That the sale by the bank to Lakeland was unwarranted as against the company, but as between the company and Lakeland was valid as to the plant and machinery transferred thereby, but not as to the mining lease ; (6) That the bank should be deemed liable as mortgagees in possession from the 6th of August, 1874, and should be charged with what, but for their wilful default, would have been the clear proceeds of gold raised from the property by the United Hand and Band Company (No Liability), by the bank from the 10th of February, 1875, by Lakeland from the 10th of September, 1875 ; (7) That the bank should also be charged with the diminution in value of the mining plant and machinery sold to Lakeland ; (8) An account of which was due to the bank.

On the 3rd of May, 1877, the full Court ordered that the decree should be varied by striking out therefrom the 5th declaration and inserting in lieu thereof a declaration that the sale to Lakeland by the bank was valid as to the plant and machinery transferred thereby, but not as to the mining lease ; and also by striking out the 7th declaration and inserting in lieu thereof a declaration that the bank in taking the said account shall be charged with what but for its wilful negligence and default would have been the clear proceeds of the sale of the plant and machinery ; and also with interest on what but for such negligence and default would have been the clear proceeds of such sale ; and also with interest upon what but for such negligence and default would have been the clear proceeds of the gold raised from the land.

In pursuance of this decree the Master in Equity reported on the 1st of June, 1878, that on the result of the accounts all principal money due or owing or accruing due to the bank, and all interest thereon, was on the 1st of November, 1875, fully paid off and discharged ; and that the bank was on the 31st of March, 1878, indebted

to the company in the sum of £5,269 6s. 10d. for principal sums and interest up to that date. On exceptions filed the sum of £6,815 11s. was certified to be due from the bank to the company. On the 9th of August, 1878, on further consideration it was ordered by Molesworth, J., that the bank and Lakeland should give up to the company the quiet possession of the land comprised in the mining lease of the 25th of October, 1867, and the mortgage of the 11th of March, 1873, or either of them, and the mines, shafts, and drifts lying under the same; that, if necessary, an injunction should be isued to put the plaintiffs in such possession; that the defendants respectively should do such acts and execute such instruments as might be necessary to release and convey to the company all their respective titles and claims to the said lands and mines, to be prepared at the company's expense, and that the bank should pay to the company forthwith the said sum of £6,815 11s., with interest thereon, at 7 per cent. per annum, from the 31st of March, 1878.

Mr. Southgate, Q.C., and Mr. Cozens-Hardy, for the apellant bank:—

It is entirely opposed to the practice and rules of a Court of Equity to make a decree for redemption on a bill which does not pray for redemption. It is not sufficient that taking bill and answer together it appears that the suit is in substance one for redemption; the old rule is that a plaintiff coming to redeem must offer to redeem. If a mortgagor admits a mortgage he cannot file a bill for any purpose without offering to redeem. Here the relief sought was wholly inconsistent with the right of redemption. Reference was made to Inman v. Wearing;[1] [*396] Gordon v. Horsfall;[2] Johnson v. Fesenmeyer;[3] Crenver Mining Company, Limited, v. Willyams;[4] Parkes v. McKenna;[5] (which was said

[1] 3 D. G. & S. 729.

[2] 5 Moo. P. C. 393, 409, 411, 421.

[3] 25 Beav. 88, 96, and on appeal, 3 De G. & J. 13.

[4] 35 Beav. 353.

[5] L. R. 10 Ch. 96, 120.

by the Court below, see 3 Vict. L. R. 67, to have overruled Johnson's case, although Johnson's case was never cited therein); Hickson v. Lombard;[6] Hilliard v. Eiffe;[7] London and Chartered Bank v. Lempriere;[8] Troughton v. Binks;[9] Martinez v. Cooper;[10] Parkinson v. Hanbury;[11] Finch v. Brown;[12] Wilson v. Cluer;[13] Nelson v. Booth;[14] Dunstan v. Patterson;[15] Cotterell v. Stratton;[16] Norton v. Cooper.[17]

Again, assuming that accounts ought to have been directed against the bank, still the bank ought not to have been charged except during the period in which it was itself in possession of the property. It ought not to have been charged as for wilful default or otherwise during the period in which the old company and Lakeland were respectively in possession. At all events, if the bank is to be held liable for receipts, either by the old company or Lakeland, it ought also to be credited with all moneys expended by them respectively in working or developing the mine. It was further contended that Cuthbert's purchase of the 6th of August, 1874, was a valid purchase, and extinguished the equity of redemption; and that in any event the bank's sale to Lakeland was a valid exercise of the power of sale contained in the mortgages. Lastly, the bank, against which accounts were directed to be taken as mortgagee, was entitled in the character of mortgagee according to the principles of a Court of Equity to its costs of the cause. The question of costs is a legitimate subject of appeal, although the Appellate Court does not on a mere ques-

[6] L. R. 1 H. L. 324.
[7] L. R. 7 H. L. 39.
[8] L. R. 4 P. C. 572.
[9] 6 Ves. 573.
[10] 2 Russ. 198.
[11] L. R. 2 H. L. 10.
[12] 3 Beav. 70.
[13] 3 Beav. 136, 139.
[14] 3 De G. & J. 119.
[15] 2 Ph. 341.
[16] L. R. 8 Ch. 235.
[17] 5 D. M. & G. 728.

tion of costs try the merits of a cause ; Chapell v. Purday ;[18] Attorney-General v. Butcher.[19]

[*397] Mr. Joshua Williams, Q.C., and Mr. J. D. Wood, for the respondent company.

No decision has been cited on the other side to the effect that a Court of Appeal will set aside a decree for redemption simply on the ground that the plaintiff did not ask for redemption in his bill. The only authority to that effect is a dictum of Lord Eldon's in Martinez v. Cooper,[20] which it is submitted is not sufficient. The cases cited on the other side are distinguishable from this, for here the bill does much more than seek to set aside the mortgages as invalid. It seeks also, even if the mortgages are held valid, to set aside several collusive arrangements, and pretended and fictitious sales subsequently entered into. A mortgagee who has thus endeavoured to defraud his debtor, and is shown, moreover, on the evidence and Master's report to have been considerably overpaid at the date of suit, cannot fall back upon the character of creditor and mortgagee and avail himself of a technical defence and benefit which might have belonged to him in that character. Reference was made to Incorporated Society v. Richards.[21]

As regards the bill of sale to Cuthbert on the 24th of August, 1874, which followed the collusive action, judgment, and sheriff's sale of that year, it was, independently of the collusive character of the whole transaction, inoperative as regards the leasehold by reason of the Transfer of Land Statute ; see Sections 42. 84, 106. No evidence was given that the Registrar of Titles was served with a copy of the writ of fieri facias (see Sec. 106). The bill of sale was registered under the 7th part of "The Instruments and Securities Statute, 1864" ; but not under the Transfer of Land Statute, and is not according to any of the forms set out in the 15th

[18] 2 Ph. 227.

[19] 4 Russ. 180.

[20] 2 Russ. 198.

[21] 1 Dr. & War. 258, 334.

schedule to that Act. As regards the sale to Lakeland, that was submitted to be invalid as between the bank and the company, at any rate as regards the leasehold. See section 85 of the said Statute. No proper notice was given either under section 84 or section 85, Registrar of Titles v. Paterson.[22] Whatever title Lakeland might be able to assert the company must be placed as far as possible in the same position as regards the bank as if such [*398] sale had never taken place; Smith v. Harrison.[23] As regards the correctness of the principle on which the accounts were taken in the matter of sale proceeds and interest, see Montgomery v. Calland ;[24] Quarrell v. Beckford.[25] As regards costs, the decree is right in holding that the mortgagee had by its conduct disentitled itself to costs.

Mr. Eddis, Q.C., and Mr. Shebbeare, for the respondent Lakeland.

The mine is no longer capable of being worked to a profit, and its possession is of no value. Lakeland has no interest in disputing the orders appealed against declaring the invalidity of his purchase so long as he is not held liable for the proceeds of gold obtained by him during his mining operations nor for negligent working. The orders were correct in declaring the sale to him of the plant and machinery valid, and in not holding him liable as aforesaid. He was a bona fide purchaser for value without notice of any of the company's rights to impeach the validity of the sale.

Mr. Southgate, Q.C., replied.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE :—

The company which is the first of the respondents in this appeal, and which will, throughout this judgment,

22 2 App. Cas. 110, 116, 117.

23 In the Privy Council, 41 L. J. (P. C.) 34 ; 20 W. R. 594 ; 27 L. T. (N. S.) 188 ; below, 6 Wy W. & A'B. (Eq.) 182; 3 Aust. Jur. 44.

24 14 Sim. 79.

25 1 Maddock, 269.

be designated as "the company," was incorporated on the 18th of October, 1866, under the provisions of a colonial statute, The Mining Companies Limited Liability Act, 1864, for the purpose of working certain mines at Ballarat. The National Bank of Australasia (the appellant), which will hereafter be spoken of as "the bank," had a branch at Ballarat, and were the bankers of the company. In 1873 the then directors of the company caused to be executed under its common seal two securities in favour of the bank. The first of these was an indenture bearing date the 22nd of February, 1873, [*399] which, after reciting a resolution of the shareholders of the company, empowering the directors to borrow money not exceeding £20,000, and an agreement between the directors, purporting to act in pursuance of the powers given to them by that resolution, and the bank for an advance of £10,000, and for having the repayment of that advance with all further sums in which the company might thereafter become indebted to the bank, with interest at the rate of 7 per centum per annum, secured in manner thereinafter appearing, and also by an assignment by way of mortgage of the leasehold property of the company bearing even date therewith, assigned by way of mortgage, the plant and machinery thereby specified. This deed fixed no time for the repayment of the sums secured, but contained a power of sale, expressed in the fullest terms, which the bank was to be at liberty to exercise if the company should make default in payment after service upon it of a demand in writing under the hand of the manager or acting manager of the Ballarat branch of the bank.

The second security, being the further security mentioned in the indenture of the 22nd of February, was not executed until the 11th of March in the same year. It was an instrument of mortgage of the leasehold estate therein described of which the company was the registered proprietor under the provisions of the Transfer of Land Statute, otherwise known as Act No. 301 ; and it was, with one variation that will be hereafter noticed, in the form prescribed for mortgages by that statute,

and was duly registered on the 16th of April, 1873. The property comprised therein will be henceforth called "the mine."

In 1876 the company instituted against the bank and the respondent Lakeland, a purchaser from the bank of the mortgaged property, a suit of which the nature will hereafter be considered. On the 6th of December in that year Mr. Justice Molesworth made an interlocutory decree which, amongst other things directed an account to be taken against the bank as mortgagees in possession. The full Bench of the Supreme Court of Victoria affirmed, with some slight variations, the decree of Mr. Justice Molesworth by a decree, dated the 3rd of May, 1877. Against this last decree the bank obtained leave to appeal on the 16th of May in that year. That appeal is the first of those of which their Lordships have now to dispose. [*400] Pending it, the accounts directed by the decree were taken in the Master's office; and on the 9th of August, 1878, an order on further directions was made by Mr. Justice Molesworth, which on appeal was affirmed by the full Court by its order of the 30th of the following month. The second appeal to Her Majesty is against this last order.

The two appeals, though heard together, will be considered separately. The first and principal objection taken to the interlocutory decree is that inasmuch as the company, by its bill, impeached the validity of the mortgage securities which the Court affirmed, no decree ought to have been made in the suit, except one of dismissal without prejudice to the plaintiff's right to bring a regular suit for redemption. In support of this contention the learned counsel for the bank relied upon the rule of Courts of Equity to this effect, which they insisted was established by the case of Troughton v. Binks;[26] Martinez v. Cooper;[27] Gordon v. Horsfall;[28]

[26] 6 Ves. 573.

[27] 2 Russ. 198.

[28] 3 De G. & Sm. 729.

Inman v. Waring ;[29] Johnson v. Fesenmeyer ;[30] and Crenver Mining Company v. Willyams.[31]

Their Lordships do not dispute the authority of these cases, but conceive that the present is distinguishable from them, and does not fall within the somewhat strict and technical rule affirmed and enforced in them. It will be found in all of them, if examined, that whilst on the one hand the plaintiff impeached the mortgage securities, the defendant on the other insisted on his rights as mortgagee and on nothing more, and that the relation of mortgagor and mortgagee having been established, the Court held that the plaintiff could not be allowed to have a decree for redemption on a bill which disputed the existence of that relation, and contained no prayer for redemption. The rule is treated as a privilege incident to the character of mortgagee, which the defendant had throughout admitted and insisted on. But what is the present case? The bill, admitting the execution of the mortgages, insists that such execution was ultra vires the then directors, and prays that they may be declared void as against the company ; but it also states, and impugns as fraudulent and void against the company, [*401] a series of transactions the effect of which, if valid, would be to destroy the company's right of redemption, and to convert the title of the bank from a mortgage into an absolute title. The 28th paragraph, moreover, contains a direct statement that the sums advanced by the bank upon the mortgages had been more than satisfied by the value of the gold obtained by them from the mine. And the bill prays, amongst other things, that all the impeached transactions may be declared void as against the company ; that possession of the mine, and of so much of the plant and machinery as remains in the possession or control of the defendants' may be restored to the company ; and that an account may be taken of all gold, or the proceeds thereof, received by the bank, or which but for

[29] 5 Moo. P. C. 393.

[30] 25 Beav. 88.

[31] 35 Beav. 353.

their wilful default might have been received from the mine, and of the proceeds of any machinery and plant sold by the defendants, and for payment of what may be found due on taking the account together with interest thereon, "the plaintiff offering and undertaking to pay or allow to the defendants all sums properly expended by them respectively in the working of the said mine, for the substantial benefit of the property, and also all other just credits; and that all proper and necessary accounts may be taken and all necessary directions given."

The bank by its answer, not relying wholly on its title as unpaid mortgagee, with all the privileges as well as liabilities incident thereto, maintained the validity of the transactions subsequent to the mortgages which were impeached by the bill; alleged that under the circumstances thereinbefore appearing it became absolutely entitled to the property comprised in the mortgages; submitted that it was not liable to account to the company, or to any other person for its dealings therewith, or for the proceeds of the sale of any of the said property; and denied that the plaintiffs had any title to, or right or interest in the property the subject of the suit, or the accounts thereby sought.

From this statement of the somewhat loose and informal pleadings in the cause, it plainly appears that the issues raised between the company and the bank were not merely mortgage or no mortgage, but further whether, by means of its acts subsequent to the impeached mortgage, the bank had ceased to be mortgagees, and had become absolute owners. [*402] The Court was bound to try all those issues. The dismissal of the suit might have been taken to affirm the title set up by the bank generally, or would at least have left its claim to more than a mere mortgage title, subject to redemption, open to future litigation. Again, if the company, as the Court observed, failed to establish its right to have the mortgages set aside, but succeeded on all the other issues, the result was only to modify the relief prayed by the bill, and it was obviously necessary to

direct the accounts ancillary to that modification in order to ascertain whether, as alleged by the bill, the bank's advances on the footing of the mortgages had been more than satisfied by their receipts, or whether there was still any balance due to them in respect of those advances. Their Lordships are, therefore, of opinion that the rule invoked does not apply to such a case as the present, and conceive that they are in some measure supported in that opinion by the cases of Montgomery v. Calland[32] and the Incorporated Society v. Richards,[33] which will be hereafter noticed with respect to the other questions raised at the hearing of these appeals. They prefer to rest their judgment on this point upon the distinction taken above, rather than upon the general principle upheld in Parker v. McKenna,[34] The London Chartered Bank v. Lempriere[35] and Hilliard v. Eiffe,[36] because those decisions relate to what should be done on the failure of the plaintiff to prove allegations of fraud in general cases, whereas the rule invoked by the bank in this case is one based upon the relation of mortgagor and mortgagee. The principle, however, of these decisions, so far as it is applicable to this case, is in favour of the company.

Assuming, then, that the bill ought not to have been dismissed on the ground suggested, their Lordships have to consider whether the questions determined in favour of the company were correctly so determined, and whether the decree based on such findings was incorrect either in substance or in form.

Little, if anything, was urged at the bar by way of argument to show that the declarations of this decree touching the transactions [*403] subsequent to the execution of the mortgages were incorrect.

The first of these transactions is the execution sale to Cuthbert in trust for the bank on the 6th of August,

32 14 Sim. 79.
33 1 D. & War. 158.
34 L. R. 10 Ch. 96.
35 L. R. 2 P. C. 572.
36 L. R. 7 H. L. 39.

1874, which is the root of the title set up by the bank to an absolute interest in the mortgaged property. The facts proved as to this were the following. In the preceding month of July the company, being indebted to the bank in the sum of £15,384, and being otherwise, as it would seem, in an unprosperous condition, a scheme was set on foot for the formation of a new company, for the issue of new shares the proceeds whereof were to be applied partly in reduction of the debt to the bank, and for vesting the property, subject to the mortgage, in this new company. This, of course, could not be legitimately effected except with the consent of the requisite number of shareholders ascertained by proceedings duly had under the provisions of the deed of association of the company. No such proceedings were had. The course of action adopted was to cause the company's interest in the mortgaged premises to be seized and sold in execution in a collusive action, the proceedings wherein were previously arranged between the then directors of the company and their solicitor, and the manager (Robson) and the solicitor (Cuthbert) of the bank, the purchaser at the execution being Cuthbert, as trustee for the bank. One reason why the bank thus became purchasers seems to have been the apprehension that any stranger who purchased might question the validity of the mortgages. The bank, through Cuthbert, afterwards transferred the interest purchased at the execution sale to trustees for the new company, receiving from the latter the sum of £3,400 in reduction of the balance due upon the mortgage.

It is clear that by these collusive proceedings the bank could obtain no good title against the company, and that the Supreme Court of Victoria was right in so declaring. But it is equally clear (and this is material to one question raised touching the form of the decree) that, although the ultimate object of the contrivance was to substitute the new for the old company as mortgagors, with a right of redemption, the effect of the proceedings, if valid, would have been to vest the interest of the old company, i.e., the equity of redemption, in the

bank between the date of the execution sale and that of the subsequent transfer to the new company, [*404] and to make them absolute owners of the mortgaged premises during that period. That this has been the view of its rights taken by the bank is shown by the third of its grounds of appeal from Mr. Justice Molesworth to the Full Bench of the Supreme Court of Victoria, and by the first of the "reasons" of its case in this appeal.

The next material act of the bank was the issue of the notice of the 10th of February, 1875 (the terms and effect of which will be afterwards considered). This was somewhat inconsistently served upon the old as well as upon the new company.

Then came the proceedings of the 5th of March, 1875, under which the mortgaged premises were put up for sale, as under the powers of sale contained in the indenture of assignment and instrument of mortgage, and knocked down to the Messrs. Davey. This transaction had also been declared by the decree to be void as against the company. A question has been raised whether it was an actual sale, or a mere buying in of the property put up for sale. In neither view can it have had any effect on the right of the company. On the second hypothesis it would necessarily leave the rights of all parties as they were; on the first, the sale would be impeachable by the company, on the ground that the Daveys were merely nominal purchasers on behalf of the bank, who, as mortgagees selling under their power of sale, could not sell to themselves.

The last and most important transaction to be considered is the sale to Lakeland, both of the plant and machinery and of the mine, for one lump sum of £6,000, under the memorandum of agreement of the 15th of September, 1875. Mr. Justice Molesworth held that this sale was unwarranted as between the company and the bank; but as between the company and Lakeland was valid as to the plant and machinery, but not as to the mine. The full Court, however (and, there being no cross appeal, its decision on this point must be accepted as final), held that, as between all parties, the sale was

valid as to the plant and machinery, but not as to the mine. The question, therefore, is reduced to that of the validity of the sale of the mine.

Mr. Justice Molesworth, being doubtless more familiar than we are here [*405] with the provisions of the Transfer of Lands Statute, and their application, summarily disposed of this question by saying, "I do not think that the bank effectually sold Lakeland the mining lease. It could only make the title under 301, and did not." This point, however, having been raised at the bar with some distinctness, at least in Mr. Southgate's reply, their Lordships will deal with it more in detail.

It is not immaterial to consider in what character the bank was dealing with Lakeland in this transaction. On the face of the agreement of the 15th of September, 1875, they do not purport to be acting as mortgagees exercising a power of sale. According to their case, they were then the absolute owners of the mine, inasmuch as whatever right of redemption had existed in the old company had been extinguished by the sale to Cuthbert in 1874, and whatever right of redemption had ever existed in the new company had been extinguished by the execution proceedings taken in March, 1875, against that company (which thenceforth disappeared from the scene), and by the subsequent assignment from Hardy to the bank. It is hardly necessary to observe that a sale of the mine by the bank in the character of absolute owners, which, as between them and the company, they did not possess, could not pass a good title against the company.

If however Lakeland, to use Mr. Justice Molesworth's expression, is "entitled to the benefit of all the muddled titles and powers which the bank had to convey to him," and the sale is to be treated as made by the bank in exercise of the power given by the instrument of mortgage, the transaction is impeachable upon other grounds. The company was the registered owner of the mine under the provisions of the Transfer of Land Statute, and the mortgage was made under and subject to the provisions of the 83rd and following sections of that

Act, and was duly registered thereunder. The instrument itself is in the form set forth in the 12th schedule to the Act, except that it contains, as that form permits, a special covenant or agreement, which will be hereafter considered. Hence the only way in which the mortgagee could extinguish the rights of the mortgagor in the mine was by foreclosure, under 31 Vic. No. 317 (of which there is no question here), or by sale under the 84th, 85th and 87th sections of the Transfer of Land Act [*406] The 84th section provides that if the mortgagor shall make default in payment of the principal sum or interest, and such default shall be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee may serve on the mortgagor, in the manner therein specified, notice in writing to pay the money owing on the mortgage. The 85th section provides that if such default shall continue for one month after the service of such notice, or for such other period as may in such mortgage be for that purpose fixed, the mortgagee may sell the land, giving him ample powers and discretion as to the mode of sale, and providing that no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale. The 87th section provides that, upon the registration of any transfer signed by a mortgagee for the purpose of such sale as aforesaid, the estate and interest of the mortgagor in the land therein described at the time of the registration of the mortgage, shall pass to and vest in the purchaser, freed and discharged from all liability on account of the mortgage, etc.

The special clause in the instrument of mortgage was to the effect that, notwithstanding anything contained in the Land Transfer Act, it should be lawful for the bank, in the event of default being made in the payment of the principal money and interest secured "on such demand being made as aforesaid," immediately to serve such notice of demand as aforesaid in the manner

prescribed by the 84th section of the statute on the company, and, after the expiration of fourteen days from the service of the notice of demand, to sell the land in pursuance of the powers in that behalf vested in the mortgagee under the 85th section of the statute.

It has been argued that the demand of the 10th of February, 1875, was the only notice of demand which, under this clause, was requisite in order to support a sale made fourteen days after this service in pursuance of the statutory power. The clause is not very clearly worded, but their Lordships cannot agree in this construction of it. A demand was necessary in order to fix the time of payment. Until its service there could be no default, and it may be further remarked that the demand actually served [*407] makes no reference to the statutory mortgage of the mine, but merely specifies, as the consequence of the failure to make payment forthwith, that the bank will proceed to exercise all or such of the powers contained in the bill of sale (of the chattels) as it shall see fit. The clause in question seems to their Lordships expressly to require service of some notice of demand to be made after default in payment. It may qualify the 84th section by allowing that notice of demand to be served immediately instead of "one month" after default, and the 85th section by allowing the sale to be made fourteen days instead of one month after service of such notice, but it does no more. It does not deprive the mortgagor of the right to have a notice of demand served upon him, after he is in default, as a necessary preliminary to a sale under the statutory power. From a case recently before their Lordships (Campbell v. Commercial Bank of Sydney), which arose upon similar provisions in a New South Wales Act, it may be inferred that, upon an application to complete the title of the purchaser by registration under the 87th section, an objection on the ground of the failure to serve a proper notice of demand might, and probably would, have been taken by the registrar. Again, it follows from both the 42nd and 87th sections of the Act under consideration, that, whether the transaction with

Lakeland be regarded as a sale by absolute owners or as one by mortgagees under the statutory power, no interest in the mine could effectually pass to the purchaser until registration, and consequently that the agreement of the 15th of September, 1875, was a mere agreement for sale which, whatever equities it created between the bank and Lakeland, left the prior equity of the company untouched.

Their Lordships have now to deal with the particular objections taken to the form of the decree. In order to estimate the weight of these, it will be well to consider what was the general nature of the decree to be made in a suit so framed, and upon the facts so found. The suit was in the nature of an equitable ejectment, in which each party claimed an absolute interest in the property, for the profits of which the bill sought an account. The Court, taking an intermediate view of the rights of the parties, found that the relation of mortgagor and mortgagee originally subsisted between the parties, [*408] and had never been effectively determined; that the transactions on which the bank relied as making their title absolute were void against the company; that consequently it was necessary to take an account of what, if anything, remained due upon the mortgage, and to ascertain whether, as alleged by the company, the bank's charge had been satisfied when the bill was filed.

To such a state of things the observation of Lord St. Leonards, in the case of the Incorporated Society v. Richards,[37] apply. When pressed to give the defendants the advantages of a mortgagee in an ordinary suit for redemption, he said, "This is a peculiar case, and cannot be treated as the ordinary case between mortgagee and mortgagor. Here you set up a title adverse to the owner; and when a creditor denies his character as such, and claims as owner, I cannot allow him to fall back on his original character of creditor, as if he had never departed from it. I will never allow a party, who has put the owner at arm's length, to turn round,

[37] 1 D. & War. 334.

when defeated, and claim all the benefits attached to the character of a fair creditor."

The particular objections to the form of the interlocutory decree will now be considered in detail. The first was that it charges the bank as mortgagees in possession from the 6th of August, 1874, the date when Cuthbert took possession of the mine. This objection was but faintly pressed, since it is obviously for the interest of the bank that the account should cover the period between that date and February, 1875, when the bank resumed actual possession, inasmuch as the yield of the mine whilst the new company worked it was worth only £7 19s., whilst the sums allowed for disbursements during the same period, and for which the bank got credit in account, amount to £4,256 5s. 6d. In any case, however, the direction appears to their Lordships to be correct, because it is consistent with the facts established, and with the claim of the bank to an absolute title in the mine as against the company from the date of the sheriff's sale to Cuthbert.

The second and third objections were that the decree erroneously treats the bank as chargeable with the value of the gold obtained, [*409] first, by the new company, and secondly, by Lakeland. Their Lordships are of opinion that the bank was properly so treated. As mortgagees in possession they were admittedly accountable. not only for their actual receipts, but for what but for their wilful default they might have received. And it appears to their Lordships that whatever was received by those whom it has been found the bank put into possession without just title, and in derogation of the company's rights, has correctly been held to fall within this category.

Another objection taken to the decree was that, as varied by the full Bench, it made the bank chargeable with interest on the principal moneys for which it was held accountable. And the learned counsel for the bank relied much upon the general rule affirmed in Nelson v. Booth,[38] to the effect that a mortgagee in possession is

[38] 3 De G. & J. 119.

not chargeable with interest on his receipts if, when he took possession, an arrear of interest was due to him. This, however, as has been shown, is not an ordinary redemption suit, and the before cited case of the Incorporated Society v. Richards,[39] is a clear authority that in an exceptional case like this the defendant cannot claim the immunities of an ordinary mortgagee. There Lord St. Leonards ordered the account to be taken with annual rests. Such a direction, though more usual, is in terms less favourable to the defendant than that considered in the decree under appeal, which amounts only to one that interest be allowed on both sides of the account. That it was competent to the Court in the circumstances to give such a direction their Lordships entertain no doubt. The question whether the Master has correctly calculated interest under that direction was one which could only be raised on an exception to his report, and the bank filed no exceptions thereto. Their Lordships may, however, remark that he seems to have acted correctly in allowing compound interest with half yearly rests on the mortgage debt, that debt being the balance of a current banking account kept in that way; and that, if the interest was to be so calculated on one side of the account, it ought, by parity of reason, to be calculated in the same way on the other side. Whether the bank ought to have been charged with compound interest on the balance found due from it to the company on the 31st of March, 1876, [*410] after that date is, perhaps, a question which might have been successfully raised by an exception to the report. But it was not so raised. Another objection taken was that the interlocutory decree, instead of directing, as in an ordinary redemption suit, the taxation of the bank's costs, and the addition of the certified amount of them to the amount due for principal and interest on the mortgage, reserved the consideration of them until after the taking of the account. It is sufficient on this to say that in a suit of this character such a reservation was, in their Lordships' judgment, within the discretion of

[39] 1 D. & War. 334.

the Court, and consistent with usual practice. Whether the Court, under the reservation, was right in making the order as to costs which it made on further direction, is a question which will be considered on the other appeal. That the costs of the first appeal to the full Court were within the discretion of that Court their Lordships have no doubt. Nor would they see any grounds for impeaching the soundness of the particular exercise of that discretion were it proper to entertain an appeal on that ground.

An objection on which their Lordships have felt greater difficulty is that taken to the direction in the decree, as finally drawn up, that the bank should be charged with "what but for its wilful negligence and default would have been the clear proceeds of the sale of the said plant and machinery."

The bill, which is loosely drawn, made no special case as to the sale of the plant and machinery at an undervalue, otherwise than by alleging in the 35th paragraph that the sum of £6,000 was considerably less than the value of the mine and property sold to Lakeland, as the bank well knew, and that a larger sum had been, previously to the sale to Lakeland, offered for the said property; and as to the plant and machinery prayed only for an account "of the proceeds of any machinery or plant sold by the defendants or either of them;" saying nothing about negligence or wilful default.

Some evidence was, however, given at the hearing touching an offer of £8,000 for mine and plant, and the value of the latter; and Mr. Justice Molesworth, coming to the conclusion that the whole of the transaction with Lakeland was fraudulent and void as against the company, decreed that the bank should be charged [*411] "with the diminution of the value of the mining plant and machinery caused by its selling in excess of its replacing; and with the full value of the mining plant and machinery sold to Lakeland." His decree, therefore, so far as it related to the plant sold to Lakeland, was consistent with his finding; and it cannot be said that there was not some evidence to support both. The

difficulty, however, arises on the decree as modified by the full Court. Their judgment says, on this point, "We think, however, that the decree must be varied. We consider that the sale of the chattels was not unwarranted, and that the bank ought not to be charged with the value of the plant, etc.;" and, after dealing with the notice of demand and its effect, adds, "the declaration that the sale to Lakeland was unwarranted as against the plaintiffs, and that the bank should be charged with the diminution in value of the mining plant and machinery comprised in the mortgage, must both be omitted, but the bank must be charged with what but for wilful negligence and default would have been the clear proceeds of the sale of the plant and machinery." And the decree was varied accordingly. At first sight the first passage cited from this judgment seems to be inconsistent with what follows, and with the decree; but upon consideration their Lordships are of opinion that the words "the bank ought not to be charged with the value of the plant, etc.," must be taken to refer to the higher value of the plant and machinery before the diminution of that value by the cause contemplated by Mr. Justice Molesworth, and that the learned Judges did not thereby intend to overrule Mr. Justice Molesworth's conclusion that the plant sold to Lakeland was sold for less than its true value.

There was no constat of what was actually received by the bank from Lakeland in respect of the plant, one lump sum of £6,000 having been paid for both mine and plant, and some inquiry on this point was therefore necessary. If the Court were satisfied that the price paid for both subjects was a fair one, the proper inquiry was, of course, how much of the £6,000 was attributable to the price of the mine, and how much to the price of the plant. On the other hand, if it had grounds for supposing that the plant had been sold at an undervalue owing to the want of due care and diligence, the ordinary reference to the Master would be to charge the defendants with what but [*412] for their wilful negligence and default might have been received. The full Court appears to have corrected the judgment and decree

of Mr. Justice Molesworth by substituting this direction for his direction to charge the bank with the full value of the plant and machinery, a change in favour of the defendants.

Upon the whole, their Lordships have come to the conclusion that the full Court, as well as Mr. Justice Molesworth, had sufficient grounds for holding that the plant might have been sold for less than could have been obtained for it, regard being had to the 35th paragraph of the bill, to the evidence in the cause, and to the conduct of the bank in selling for one sum that which they had a right to sell with that which they had no right to sell. They are therefore of opinion that the appeal against the interlocutory decree wholly fails.

Little need be said on the second appeal. It has already been remarked, that if the interlocutory decree is right no question can be raised as to the accounts taken under it, inasmuch as the bank filed no exception to the Master's report. The case is still stronger against the bank on this point, for it appears from Mr. Justice Molesworth's judgment that the plaintiffs having filed exceptions, of which some were allowed, the defendants consented that instead of sending the case back to the Master, the Court should draw up an order as of the 22nd of July, 1878, fixing the amount due from the bank at £6,815 11s. The only question that remained was, what was to be done as to the costs of the suit? Now not only had the bank set up, and failed to prove, a title to an absolute interest in the property, not only had it sought to destroy the right of its mortgagor by a series of very questionable transactions, but it had then been found to have been overpaid, in its character of mortgagee, when the bill was filed. These circumstances were amply sufficient to deprive it of the ordinary right of a mortgagee to the costs of suit, and to bring the question by whom the costs were to be borne within the discretion of the Court. Their Lordships can see no ground for interfering, contrary to the ordinary practice of this tribunal, with that discretion, and must therefore humbly advise Her Majesty to affirm the decree of

the 3rd of May, 1877, [*413] and the decretal order of the 30th of September, 1878, and to dismiss these appeals with costs.

Solicitors for the appellant :—Wadeson & Malleson.

Solicitor for respondent Company :—Thomas Randall.

Solicitors for respondent Lakeland :—Brundrett. Randall & Govett.

PRIVY COUNCIL,* 1876]. [L. R. 2 App. Cases, 110.

THE REGISTRAR OF TITLES Appellant,

AND

ROBERT BRAND PATERSON Respondent.

On appeal from the Supreme Court of Victoria.

Victorian Transfer of Lands Statute—Registration of purchase from judgment debtor—Alias writ of fi. fa.

On the 2nd of January, 1872, B.'s transferor presented for registration under the Transfer of Lands Statute transfers of certain lands ; and on the 21st of the same month B. obtained registration of the transfers and the usual certificates of title. More than three months previously, viz., on the 20th of October, 1871, a copy of a writ of fieri facias (which had been issued by the Supreme Court in an action against the said transferor) was served on the appellant under Sec. 106 of the said statute, specifying the said lands as "the lands sought to be affected thereby," and was by the appellant duly entered. On the 5th of January, 1872, a copy of an alias fieri facias in the same action, with a statement specifying the same lands as the lands sought to be affected by such writ, was also served on the appellant.

On the 2nd and 28th of March, 1872, transfers of the same lands from the district sheriff to the respondent under the alias writ were lodged for registration with the appellant, who refused to register them or to issue certificates of title :—

Held, on petition by the respondent under Sec. 135 of the said statute, that the appellant was right in such refusal. B. had previously to the 5th of January, 1872, acquired a title to the lands which could only be defeated by a sheriff's transfer of them in pursuance of the original writ, and as the respondents' transfers were in pursuance of the alias writ, and were made at a time when according to the statute no valid transfer could have been made in execution of the original writ, the appellant was right in completing B.'s title by registration on the 21st of January.

*Present:—Sir James W. Colvile, Sir Barnes Peacock, and Sir Robert P. Collier. Also reported in 35 L. T. N. S. 642 ; 46 L. J. P. C. 21.

This was an appeal from three rules or orders of the Supreme Court of the colony of Victoria, made respectively on the 2nd of September, 1872, the 3rd of April, 1873, and the 19th of September, 1874, by the first of which it was ordered that the Registrar of Titles should register certain transfers of land to the respondent in accordance with the 106th section of the Transfer of Lands [*111] Statute; by the second of which it was ordered that the Registrar of Titles should call in the certificates of title to one William Baylis, and should issue to the respondent clean certificates of title to the said land under the provisions of the said statute ; and by the last of which it was ordered that the Registrar of Titles should register the respondent as proprietor of the land, and issue to the respondent clean certificates of title under the provisions of the said statute in respect of the said land.

The facts of the case and the proceedings of the Court below are sufficiently stated in the judgment of their Lordships.

[The judgment of the lower Court is here inserted, as it is frequently cited in Victorian cases.

*STAWELL, C.J.:—

Summons calling upon the registrar under "The Transfer of Land Statute," to substantiate the grounds of his refusal to register the applicant Paterson as proprietor.

A person of the name of Mulholland, the registered proprietor of two leases from the Board of Land and Works, had a judgment recovered against him for an amount not specified. On the 20th October, 1871, the execution creditor lodged with the Registrar of Titles a copy of the writ of fi. fa., with the statement required by the 106th section of "The Transfer of Land Statute." On the 2nd of January Mulholland lodged transfers of the said land from him to William Baylis, in consideration of £632. On the 5th of the same month, and before

*Reported in 3 V. R. 128, 130, sub. nom. In the matter of "The Transfer of Land Statute," ex parte Robert Brand Paterson : 3 A. J. R. 54.

the three months specified in the 106th section had expired, the execution creditor lodged an alias fi. fa., or rather a copy of it, with the registrar. After the 21st January, 1872, the transfers to Baylis deposited on the 2nd January, having been detained by the Registrar of Titles, were registered. Paterson, the present applicant, subsequently applied to be registered under transfer from the sheriff and was refused, and the reason assigned is "That as a transfer on a sale under the writ served on the 20th of October, 1871, was neglected to be left for entry upon the registry within three months, such writ ceased to bind, charge or affect the lands" (sections 3 and 106); by the 106th section the execution creditor is put in no better and, in our opinion, no worse position than he was previously. The writ does not now bind the land, but the copy of the writ when lodged, accompanied by the necessary statement prescribed by the section, precludes any transfer being registered for three months. The Registrar of Titles has apparently read the words [*131] "any writ" as if they were "any original writ." We think there is nothing whatever to justify such reading. The words "any writ" for obvious reasons refer to an alias or pluries writ just as well as to an original writ. There is nothing, in our opinion, in the context to justify limiting the words to an original writ. On the contrary, it would be a manifest and gross injustice on the execution creditor if he was so restrained. He might be thus in effect precluded from enforcing his execution against the lands. The proviso relied on, in our opinion, rather strengthens our view than otherwise. The judgment debtor declines to pay, and yet he insists upon the execution creditor levying within three months, or, if not, the execution is to go for nothing. The present case is an apt illustration of the injustice which such a reading would produce. The judgment debtor sold the land during the first three months for £632, and kept the amount. If that had been paid to the execution creditor it might perhaps have satisfied the whole judgment, but the execution creditor when he levied actually received only the sum of £8. If the words were clear and distinct, of course

we should have to apply the ordinary rules of construction to them, but certainly it is not a case in which we ought to strain the meaning of the words in order to defeat the judgment creditor of his just rights. We think that the reason assigned affords no sufficient ground for the refusal, and that the application should be granted.

The Registrar of Titles has considered it his duty, in addition to the reason assigned to offer a suggestion, that assuming the reason assigned not to be the law, Paterson should be left to any other remedy which he might have under section 146, or otherwise. We are unable to comply with that suggestion. Paterson has made an application to be registered; the reason assigned for not registering him is insufficient, and we think he is entitled to be registered. What benefit that may be to him we are not now to decide; but if he asks that the application should be granted, we think he is strictly entitled to it.

We have had some difficulty as regards the costs. By a very wise provision, if we may be allowed to say so, the commissioner may, under section 128, state a case for the opinion of the Court, and the judgment of the Court is made binding upon the commissioner and registrar respectively. In questions of law, if the commissioner, making full allowance for the fact that he is in the discharge of his public duty, declines to ask for the opinion of the Court, we must take it for granted that he considers himself competent to deal with the [*132] question. In this instance we think there was no probable ground for the refusal to register, and we shall, therefore, give a certificate to that effect. The result will be that each party will bear his own costs.

Order the entry, if not already made, to be made, and the transfer to be registered as required by section 106].

Mr. Cotton, Q.C., and Mr. Fitzjames Stephen, Q.C., (Mr. J. D. Wood with them), for the appellant :—

The main question raised by the appeal is whether in the case where a copy of a writ of fieri facias against

a registered proprietor of land, accompanied by a statement specifying the land as that sought to be affected by such writ, has been served on the Registrar of Titles, and no transfer upon a sale under such fieri facias has been left for entry upon the register within three months from the day on which the copy was served, but a copy of an alias fieri facias, accompanied by such statement as aforesaid, has been served on the registrar before the expiration of three months from the service of the copy of the original fieri facias, the registrar may, after the expiration of such three months, register a transfer of land from the registered proprietor to a purchaser from him, which had been lodged for registration before the service of the copy of the alias fieri facias, and may grant a certificate of title to such purchaser. The answer to it depends upon the construction of the 106th section of the Transfer of Lands Statute (Act No. 301), which is as follows :—

"No execution registered prior to or after the commencement of this Act shall bind, charge, or affect any land, or any lease, mortgage or charge ; but the registrar, on being served with a copy of any writ of fieri facias issued out of the Supreme Court, or of any decree or order of such Court, accompanied by a statement signed by any party interested, or his attorney, solicitor or agent, specifying the land, lease, mortgage or charge sought to be affected thereby, shall, after marking upon such copy the time of [*112] such service, enter the same in the register book ; and after any land, lease, mortgage or charge so specified shall have been sold under any such writ, decree or order, the registrar shall, on receiving a transfer thereof, in such one of the forms in the 15th schedule thereto as the case requires (which transfer shall have the same effect as if made by the proprietor), enter such transfer in the register book, and on such entry being made the purchaser shall become the transferee, and be deemed the proprietor of such land, lease, mortgage or charge : Provided always, that until such service as aforesaid, no sale or transfer under any such writ shall be valid as against a pur-

chaser for valuable consideration, notwithstanding such writ was actually lodged for execution at the time of the purchase, and notwithstanding the purchaser had actual or constructive notice of the lodgment of such writ. Upon production to the commissioner of sufficient evidence of the satisfaction of any writ a copy whereof shall have been served as aforesaid, he shall direct an entry to be made in the register book of a memorandum to that effect, and on such entry such writ shall be deemed to be satisfied. Every such writ shall cease to bind, charge, or affect any land, lease, mortgage or charge specified as aforesaid, unless a transfer upon a sale under such writ shall be left for entry upon the register within three months from the day on which the copy was served."

It is to be observed that real estate in Victoria has always been liable to be sold under an execution, at first by the 4th section of 54 Geo. III., c. 15 (repealed by the Common Law Procedure Statute, 1865, s. 2, and 1st Schedule, 1 Victorian Statutes, pp. 94 and 195), and at present by the 137th section of the Real Property Statute, 1864 (3 Victorian Statutes, pp. 469 and 470), which enacts "that houses, lands and other hereditaments and real estate in Victoria . . . shall be subject to the like remedies, proceedings and process in any Court of Law or Equity in Victoria, for seizing, extending, selling, or disposing of any such houses, lands and other hereditaments and real estates towards the satisfaction of debts, duties, and demands, and in like manner as personal estates in the said colony are seized, extended, sold or disposed of for the satisfaction of debts."

The transfers to Baylis were registered after the expiration of [*113] three months from the lodging of the original fi. fa., and at that time the writ served on the 20th of October had ceased to bind the lands. They were registered as from the time at which they were produced for that purpose—that is, from the 2nd of January, 1872. See section 37 of the Transfer of Land Statute. Till the expiration of the three months the title was defeasible.

[Sir J. W. Colvile :—The only question is, whether the alias writ is not a renewal of the term of three months.] The respondent was refused registration according to the stated grounds of refusal, first, because his transfer being on a sale under the writ served on the 20th of October, it was not left for entry upon the register within three months, and accordingly, the writs had ceased to bind, charge or affect the land (see sections 3 and 106); and secondly, because if such were not the correct view of the law, he should be left to any other remedy which he might have under section 146, or otherwise. The Chief Justice held these reasons to be insufficient. It is contended that the registration was right and that the judgment creditor was not entitled to issue a writ of alias fieri facias so as to defeat a prior assignment for value to Baylis, which had previously been lodged for registration. An attempt to keep alive the same creditor's right by a succession of alias writs is contrary to the policy of the Act. Here the sale took place under an alias writ which was issued after the transfer to Baylis had been lodged for registration.

Further, assuming that the registrar ought not to have registered the transfer and granted a certificate of title to Baylis, still as he has in fact done so bona fide, conceiving that he was required by law so to do, it is submitted that the Supreme Court had no power to order him, while such certificates remained uncancelled, to issue certificates of title to the same land to the respondent. See section 47 of the Transfer of Lands Statute. It is, moreover, contrary to the whole scope and policy of the statute that there should be two persons (not joint owners) holders of certificates of title to the same parcel of land, and according to the true construction of the statute, the Supreme Court had no power to direct the registrar to issue to the respondent certificates of title to the land in question while another person, claiming by title adverse to that of the respondent, held certificates of title to the [*114] same land. For statutes regulating the procedure of the Courts, see

19 Vict., No. 13, c. 6, and the Common Law Procedure Act, 1865, being 28 Vict., No. 274.

The respondent did not appear.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE :—

This is an appeal by the Registrar of Titles in the Colony of Victoria against three orders of the Supreme Court of that colony, dated respectively the 2nd of September, 1873, the 3rd of April, 1873, and the 19th of September, 1874. The determination of it turns chiefly upon the construction to be put upon certain clauses of an Act passed by the Colonial Legislature in June, 1866, and known as the Transfer of Lands Statute.

The circumstances under which the orders in question have been made are the following :—

In October, 1871, John Mulholland was the registered proprietor of certain lands. On the 20th of that month a copy of a writ of fieri facias, which had been issued in an action against him in the Supreme Court at the suit of William Mainfold Aitken, was served on the Registrar of Titles, in conformity with the 106th section of the Transfer of Lands Statute, specifying those lands as "the lands sought to be affected thereby." The usual entry was thereupon made in the register book.

On the 2nd of January, 1872, Mulholland presented for registration transfers of the same lands from himself to one William Baylis, in consideration of £632 paid to him by Baylis.

On the 5th of that month a copy of an alias fieri facias in the same action, with a statement specifying the same lands as the lands sought to be affected by such writ, was also served on the Registrar of Titles.

On the 21st of that month, and therefore after the expiration of three months from the date at which the copy of the first writ was served on the Registrar of Titles, that officer registered the transfers from Mul-

holland to Baylis and issued to the latter the usual certificates of title.

On the 2nd and 28th of March, 1872, transfers of the same [*115] lands from the district sheriff to the respondent under the alias writ were lodged for registration with the registrar ; but he refused to register them, or to issue certificates of title to the respondent as the proprietor. The consideration for these transfers is said to have been only £8. The respondent, therefore, if really a purchaser, and not a mere agent of the judgment creditor, seems to have known that he was buying a very questionable title.

Upon this the respondent, proceeding under the 135th section of the statute, required the registrar to set forth in writing the grounds of his refusal, and afterwards took out a summons in the Supreme Court, calling upon him to substantiate and uphold those grounds. The matter of this application was determined by Chief Justice Stawell on the 2nd of September, 1872, when the first of the orders under appeal was made. By that order the registrar was directed forthwith to enter in the register a copy of this alias writ of fieri facias, unless the same had already been entered ; and also forthwith to register the transfers to the respondent, in accordance with the 106th section of the statute.

This order having been made upon him the registrar tendered to the respondent certificates of title, qualified by a note in these terms : "This certificate is issued to Mr. Robert Paterson, the transferee, from the district sheriff, under the circumstances appearing in In re Robert Brand Paterson, reported 3 Australian Jurist, pp. 52 and 54, and in pursuance of the decision of the Supreme Court in that case." The respondent refused to accept certificates of title in that form ; and required the registrar to proceed against Baylis under the 132nd section, in order to compel him to deliver up, for the purpose of being cancelled, the certificates of title issued to him, and on the registrar's refusal to do so took out another summons in the Supreme Court against him, calling upon him to appear and substantiate and

uphold the grounds of such refusal. That summons was disposed of on the 3rd of April, 1873, by the second of the orders under appeal, which directed the Registrar of Titles forthwith to call in the certificates of title to Baylis, and to issue to the respondent clean certificates of title to the same land.

In obedience to this order the registrar took out a summons in [*116] the Supreme Court, under the 132nd section of the statute, against Baylis and one Smith, who had acquired from Baylis a charge upon the lands and was in possession of the certificates issued to Baylis. calling upon them to show cause why those certificates should not be delivered up for the purpose of being cancelled. The summons thus ultimately dismissed by the Court on the grounds that Smith had a valid charge on the land, and that so long as that subsisted the Court had no power to comply with the summons. It may be observed that the 145th section of the statute contains a strong provision in favour of purchasers for value, and apparently governed the decision of the Court on this occasion.

The parties being thus at a deadlock,—one order requiring the registrar to do that which the Court, on dismissing the last mentioned summons, had in substance declared he was at present incompetent to do, the respondent took out a third summons calling upon the Registrar of Titles to substantiate and uphold the grounds on which he had refused to register the respondent as proprietor of the land, and to issue to him clean certificates of title in respect of it.

The Court, on the 19th of September, 1874, made an order upon this summons, directing the registrar to do what he had refused to do ; and this is the third of the orders under appeal.

It is, however, to be observed that the learned Judges who made this last order, did so only because they felt themselves bound by the former orders against which there had been no appeal. Neither of them seems to have been satisfied that those orders were correct ; and Mr. Justice Fellows expressed an opinion

that the Court had been wrong throughout. An appeal to Her Majesty in Council against the last order was allowed in the colony; the appellant subsequently obtained here special leave to appeal against the first two orders, and thus the whole matter is now open on appeal before their Lordships.

The first question to be determined is obviously the correctness of the order of 2nd September, 1872.

The general object and intention of the Transfer of Lands Statute are to simplify titles to land by making them depend wholly upon registration, and the certificate of title issued in [*117] conformity with the register book. Its provisions deal with transfers of land, whether by the voluntary act of the proprietor, or under an execution issued against him. The material provisions relating to this first class of transfer are the 37th, 42nd, and the 47th sections.

The last of these makes the certificate conclusive evidence that the person to whom it is issued is the proprietor of the land; the second provides that the land shall not pass from one proprietor to another by virtue of an unregistered contract, but only upon registration; and the first provides that every instrument presented for registration shall be registered in the order of and as from the time at which the same is produced for that purpose. The time, therefore, at which an instrument is presented for registration is very material. It is the duty of the registrar to register it as from that time. On such registration the land passes; and the purchaser is entitled to the certificate which is to be the conclusive evidence of his title.

The second class of transfer is dealt with by the 106th section. This provides that no mere registration of an execution shall bind or charge the land; but that the registrar, on being served with a copy of the writ of fieri facias, accompanied by a statement specifying the land sought to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the register book, and after the sale of the

land under such writ, shall, on receiving a transfer thereof, enter such transfer in the register book ; whereupon the purchaser shall become the transferee, and be deemed the proprietor of the land. It further provides that until such service as aforesaid no sale or transfer under the writ shall be valid as against a purchaser for value notwithstanding the writ was actually lodged for execution at the time of the purchase, and the purchaser had actual or constructive notice of the lodgment of such writ.

And then, after dealing with the case in which the writ may have been satisfied, it expressly provides that every such writ shall cease to bind, charge, or affect the land "unless a transfer upon a sale under such writ shall be left for entry upon the register within three months from the day on which the copy was served."

[*118.] The policy of the Legislature in framing this section was obviously to prevent titles from being affected by the operation beyond a limited time of unexecuted writs of execution as charges on the land ; and to reconcile the rights of a judgment creditor with those of a purchaser for value, whether with or without notice. Both objects are effected by compelling the creditor to proceed within a limited time to enforce an execution by actual sale of the land affected thereby.

Again, there is nothing in the statute, or in this particular section of it, to prevent a judgment debtor from making a contract for the transfer of his land to a purchaser for value, subject to the rights which the section gives to an execution creditor, or to a possible purchaser through the sheriff.

Such a contract, no doubt, can only be perfected by registration, and must, therefore, remain defeasible until the writ is withdrawn, or satisfied, or the term of three months from the day on which the copy was served has expired.

In the present case, therefore, the title of Baylis to the lands was clear, unless it can be shown to have been overridden by that of the respondent claiming as trans-

feree not under the original, but under the alias writ of fieri facias.

The Chief Justice, in giving judgment on the first summons, said: "The registrar reads the words 'any writ' as meaning the original writ. There is nothing to justify such a conclusion. 'Any writ,' for obvious reasons, unless limited by the context, refers to an alias or pluries writ, just as much as to the original writ." It is not necessary to the applicant's case to contest this general proposition. Let it be assumed that an alias writ is duly issued in order to affect lands not previously affected by the execution; such writ would, of course, have the same operation as an original writ would have had. But it would have no more. It would affect the land for three months from the date of the service of a copy of it upon the registrar; but a transferee under it would take subject to rights acquired before such service. Nor, though it would have this operation, could it, in their Lordships' opinion have the further effect of enlarging, contrary to the plain policy of the statute, the operation of the original writ.

In the present case it is not shown, nor is it easy to see, how [*119] the alias writ came to be issued. The Common Law Procedure Act for the colony (28 Vic. No. 274) seems to contain no special provisions touching the issue of alias writs of execution. It may, therefore, be presumed that an alias writ of fieri facias could only be regularly issued in the colony under the circumstances in which it might be issued in this country; or, at all events, when such a proceeding might be necessary to reach property which had not been reached, and could not be reached by the original writ. In the present case the land in question had been reached by the original writ; nor is there any reason to suppose that when the alias writ issued, the original writ was not still in force. The 292nd section of the Common Law Procedure Act provides that every writ of fieri facias may be in the form contained in the 26th schedule to the Act; and according to that form the writ would be returnable "immediately after the execution thereof."

The section, indeed, goes on to say that all writs of execution may be made returnable on a day certain, or may be returnable after the execution thereof. But there is nothing here to show that in this case the original writ had expired before the 5th of January, 1872; and the act of the registrar in delaying the registration of the transfers to Baylis until the 21st affords a strong inference that the original writ was in force up to that date.

Therefore, whether the alias writ was or was not properly issued (a question upon which their Lordships offer no opinion), it seems clear that the service upon the registrar of a copy of it in order to affect lands already affected by the original writ, can be accounted for only by supposing that the object of the party making the service was the unwarrantable one of attempting to enlarge the statutable term of three months within which, in order to enforce his execution against the lands, he was bound to procure the sale of them.

Again, their Lordships are of opinion that upon the true construction of those provisions of the statute (which have already been referred to and considered) Baylis had, on the 5th of January, 1872, acquired a title to the lands, which could only be defeated by a sheriff's transfer of them in pursuance of the original writ. The transfers to the respondent were ex concesso, in pursuance of [*120] the alias writ, and were made at a time when, according to the statute, no valid transfer could have been made in execution of the original writ. If this be so, the registrar was right in completing Baylis' title by registration on the 21st January and in issuing the certificates to him; and was also justified in refusing to register the subsequent transfers to the respondent. It follows that the first order is erroneous, and ought to be reversed.

This being so, it becomes unnecessary for their Lordships to consider particularly the correctness of the other two orders. They are founded upon the first, and if that cannot stand, must fall with it. The case has been heard ex parte, and their Lordships are, therefore,

the more desirous to abstain from expressing any opinion upon the construction of the statute, and upon the reasons given by the learned Judges of the Supreme Court for their various orders, which is not essential to the determination of the present appeal.

They will humbly advise Her Majesty that all the three orders under appeal be reversed, and in lieu thereof that orders be made dismissing the summons of the 29th of June, 1872, with costs; and the summonses of the 12th of March, 1873, and the 29th of August, 1874, without costs. Considering that the subsequent litigation would have been avoided if the Registrar of Titles had appealed against the first order at the proper time, their Lordships have come to the conclusion that the orders of dismissal of the two last summonses should be without costs. They think, however, that the registrar is entitled to the costs of this appeal.

Solicitors for the appellant :—Freshfields & Williams.

PRIVY COUNCIL.*] [L. R. 1893, A. C. 556.

SOLLING AND ANOTHER, Plaintiffs,

AND

BROUGHTON, Defendant.

On appeal from the Supreme Court of New South Wales.

Law of New South Wales—Real Property Act, 26 Vict. No. 9—41 Vict. No. 18—Onus Probandi as between Applicant and Caveators in possession.

When the respondent applied to bring land under the provisions of the Real Property Act (26 Vic. No. 9) amended by 41 Vic. No. 18, and showed a complete documentary title, and that he was in possession within twenty years before such application :—

Held, that the onus was on the appellants, who were caveators in possession, to show that the applicant's title had been defeated—that is, that his entries on the land when vacant within the twenty

*Present :—The Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Morris, Lord Shand, and Sir Richard Couch.

years had been ineffective—in other words, had not been made animo possidendi, or had been made after his title had been extinguished.

Appeal from an order of the Supreme Court (August 18, 1891), directing certain caveats entered by the appellants to be withdrawn with costs.

[*557.] The facts are stated in the judgment of their Lordships, and the case in the Court below is reported in 12 N. S. W. L. R. 189.

Finlay, Q.C., and W. Graham, for the appellants, contended that they ought to have been treated as defendants and not as plaintiffs in an action of ejectment, they being at the date of their application in possession of the lands in suit. The Supreme Court Judge was in error in deciding the case as though the appellants had relied only on a possessory title, for they had put forward in the alternative a documentary title, which should have been duly put in issue. The case for the appellants was that the respondent had been out of possession for more than 20 years, and that accordingly his title (if any) was extinguished. The entries found by the jury to have been made by the respondent on the lands during those years were mere entries within the meaning of 3 and 4 Will. 4, c. 27, s. 10, and were not made animo possidendi. Reference was made to Trustees, Executors and Agency Company v. Short ;[1] Doe v. Barnard ;[2] Dixon v. Gayfere ;[3] Asher v. Whitlock ;[4] [Cozens-Hardy, Q.C., referred to Jenkins v. Jones [5]].

Cozens-Hardy, Q.C., and Vaughan Hawkins for the respondent, were not heard.

The judgment of their Lordships was delivered by, LORD MACNAUGHTEN :—

The question in this case relates to the title to a piece of land containing ten acres, situate at Gore's

[1] 13 App. Cas. 793.
[2] 13 Q. B. 945.
[3] 17 Beav. 431.
[4] L. R. 1 Q. B. 1.
[5] 9 Q. B. D. 128.

wharf in the parish of Willoughby in the county of Cumberland. The proceedings commenced on the 2nd of November, 1887, with an application by the respondent Thomas Broughton, to bring the land under the provisions of the Real Property Act, 26 Vict., No. 9, amended by 41 Vic., No. 18. The applicant's title was passed by the examiners of titles, and the usual notices were issued. On the [*558] 16th of November, 1889, the appellants who were in possession of the land at the time lodged caveats against the application. Cases were stated in pursuance of the Act by both parties ; and in the result issues were settled which the Court directed to be tried before a jury between the caveators as plaintiffs and the applicant as defendant.

The applicant in his case showed a complete documentary title commencing with a Crown grant dated the 29th of September, 1838, to one William Gore in fee. The caveators relied on a possessory title, and alleged that the applicant had been out of possession for more than twenty years. An alternative case in which they put forward a documentary title was abandoned.

The trial took place before Sir William Windeyer, J., and a jury of four persons. It lasted six days. The learned judge summed up the case to the jury, who by the consent of both parties were not required to find a verdict on the specific issues. They found a special verdict on certain questions which were submitted to them, and the issues were reserved to be dealt with by the full Court.

The judgment of the full Court, of which Sir William Windeyer, J., was himself a member, was delivered by Sir Frederick Matthew Darley, C.J., on the 18th of August, 1891. The judgment states the material findings of the jury in the following terms :—

"In their answer to the second question the jury found that Broughton made an entry on the land in 1855 ; and reading this finding with the evidence given, it must be taken to mean an entry in June, 1855, upon the land when it was vacant and in the occupation of

no one. Then, in answer to the third question, the jury found that Broughton made an entry when no one was in actual occupation between November, 1867, and November, 1887; and looking at this by the light of the evidence it plainly refers to an entry by Broughton in the year 1875, when he went there and found the place vacant and the house upon it empty."

Upon these findings, having regard to facts which were either admitted or proved, the Court was of opinion that the caveators had "failed to show that for any period of twenty years they were in continuous possession," and concluded by stating that [*589] "the applicant must in both suits be declared to be the party finally successful and the caveats must be removed."

From this judgment and the orders consequential upon it the caveators have appealed.

Their first ground of complaint is that they ought not to have been made plaintiffs in the trial of the issues, but that they ought to have had such advantage as a defendant in possession has in an action for the recovery of land. In answer to this objection it would probably be sufficient to say that there was no appeal to the full Court, and that there is no appeal to this board, from the order which directed the caveators to be plaintiffs. It is stated in the judgment under appeal that it has been held in New South Wales "that a caveator in possession is not in the same position as a defendant in ejectment," and authority was cited in support of that view. Their Lordships do not desire to throw any doubt upon this proposition, which in itself does not seem unreasonable, or indeed to express any opinion upon it, as the point is not properly before them. But it may be observed that in the present case the caveators would have gained no advantage by being made defendants. The applicant comes forward and shows a complete documentary title, and proves that he was in possession within the period of twenty years before the commencement of the proceedings. Then the burden of proof is shifted; Leigh v. Jack,[6] and it lies upon

[6] 5 Ex. D. 264.

the caveators to show that the applicant's original title has been defeated, or in other words that the entry in 1875 was not effective.

Then it was objected that the findings of the jury as to Broughton's entries on the land come to nothing. The statute, it was pointed out, declares that no person shall be deemed to have been in possession of any land within the meaning of the Act "merely by reason of having made an entry thereon." That "evidently applies," as Lord Campbell observes in Randall v. Stevens,[7] "to a mere entry, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time and pronouncing a few words, without any attempt or intention or wish to take possession." In the present [*560] case there is no ground for supposing that the findings of the jury, who must have had their minds directed to this question —the substantial question between the parties—were illusory and unmeaning. The entries must have been regarded by the jury as effective. They are so treated by the Court which included the learned Judge who presided at the trial. And, if the evidence is to be looked at it is plain that these entries were made animo possidendi, and that in entering upon the land Broughton was in of his fee simple title, and that any other person there not having his license or authority would have been a mere trespasser.

Under these circumstances it was for the caveators to prove that Broughton's entry in 1875 was of no avail. That could only be done by showing that Broughton's right and title had been previously extinguished. Now the facts are these:—William Gore mortgaged the land in fee in 1840. He died intestate in 1845, leaving his son William Bligh Gore his heir-at-law. In May, 1855, the successor in title of the original mortgagees sold the land as he was entitled to do by the terms of the mortgage deed. The purchaser in that sale mortgaged the land in fee to Broughton on the 15th of June, 1855, and Broughton purchased the equity of redemp-

[7] 2 El. & Bl. 652.

tion in 1861. So long as the mortgage continued the possession of William Bligh Gore, the heir-at-law of the mortgagor, was not hostile to or inconsistent with the mortgagee's right. It was said that there was no proof that interest was ever paid on the mortgage. It was for the caveators to prove non-payment of interest, if that fact was supposed to be material. It could not really have been material, because no title could have been acquired under the Statute of Limitations between 1840, the date of the mortgage, and 1855, the date of the sale. If William Bligh Gore continued in possession after the sale, as it may be presumed he did, until Broughton's entry in the following June, he must either have been tenant at will or tenant at sufferance. Broughton, it seems, took William Bligh Gore with him when he made the entry in June, 1855, and authorized him to remain in occupation. Whether Wm. Bligh Gore in fact acted as Broughton's agent or not, from June, 1855, he was tenant at will, and even if there [*561] had been continuous occupation from that date by William Bligh Gore and persons claiming under him without any acknowledgment of Broughton's title, no title could have been acquired under the Statute of Limitations until June, 1876, and it is found that Broughton entered again in 1875. The same result may be reached, as it has been reached by the Full Court, on the showing of the caveators themselves. They seek to set up a possessory title derived from one French, who died in October, 1875, and who was the husband of Mrs. French, one of the appellants. But French did not enter until after the death of William Bligh Gore in 1863, and the appellants cannot connect French in title with William Bligh Gore. French was a nephew of William Bligh Gore, but he was neither his devisee nor his heir nor one of his next of kin. There must have been an interval between the death of William Bligh Gore and the entry of French. During that interval, whether William Bligh Gore was tenant at will or tenant at sufferance, the rightful owner on the determination of the tenancy by the death of the tenant must have been in of his fee simple without the presence of any other

person on the land who could carry on or initiate a claim hostile to or inconsistent with his right.

Under these circumstances the caveators cannot connect themselves with William Bligh Gore, and the authority of Doe v. Barnard,[8] on which they seem to have relied in the Court below is really against them.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants :—Henry Kimber & Co.

Solicitors for respondent :—Want & Co.

PRIVY COUNCIL.*] [6 R. 429.

WILSON, Plaintiff,

AND

McINTOSH, Defendant.

On appeal from the Supreme Court of New South Wales.

New South Wales—Land—Caveat—Limitation of time—Waiver—Quilibet potest renunciari juri pro se introducto—Real Property Act, 1862 (26 Vict., No. 9) ss. 21, 22, 23—Real Property Act, Further Amendment Act, 1877 (41 Vict., No. 18).

The period of three months, which is the limit allowed by Sec. 23 of the Real Property Act of New South Wales for taking proceedings after entering a caveat, is introduced for the benefit of the person applying to have the land to which the caveat applies brought under the Act, and may, therefore, be waived by him.

On 8th January, 1887, the respondent McIntosh lodged an application in the office of the Registrar-General to bring under the Real Property Act (26 Vic. No. 9) certain lands, comprising about forty acres. The applicant's title was alleged to depend on the will of one Cornelius Sheehan, a former owner of the lands, whereby he

[8] 13 Q B.. 945.

*Present :—Lords Watson, Halsbury, Macnaghten and Morris, Sir Richard Couch and Davey, L.J.

devised his real estate to his then wife, Isabella Sheehan, for life, with remainder to the applicant in fee.

In his declaration in support of the application the respondent alleged that there was no one in possession or occupation of the land adversely to his interest, and that there was not any fact or circumstance material to the title which was not fully and fairly disclosed to the utmost extent of his knowledge and belief.

On 12th May, 1887, the appellant lodged a caveat against the land being brought under the provisions of the Act, but she did not take any proceedings to establish her title or apply for an injunction restraining the Registrar-General from bringing the land under the provisions of the Act. The appellant denied the title of the respondent on the allegation that Isabella Sheehan, the former wife of the testator Cornelius Sheehan, died in his life time, and that the testator had subsequently married again and thereby revoked his will, and she further alleged that she and those through [*430] whom she claimed had acquired title to the land by possession under the Statute of Limitations.

On 1st November, 1887, more than three months after the lodging of the caveat, the respondent stated a case for the opinion and direction of the Supreme Court. On 4th November he applied for and obtained an order of the Court directing the appellant to state and file a case on her behalf, which she did on 18th November.

Having obtained from the appellant a statement of her case, the respondent did not further proceed with his application, but on 24th July, 1890, he served the appellant with a notice of motion to have her caveat set aside on the ground that, as she had failed to take any proceedings within three months of its filing, as provided by Sec. 23 of the Real Property Act, the caveat lapsed.

It appeared, from the appellant's affidavits in opposition to the motion, that on 8th May, 1888, her solicitor had inquired by letter whether the respondent intended to proceed with the case, and receiving no answer, had sent his clerk to inquire, and that the clerk stated that

the respondent's solicitor informed him that there was a dispute as to costs between him and his client, and that he would have nothing more to do with the matter. The respondent's present solicitor, however, made an affidavit of his belief that his client was not aware until recently that the appellant had not obtained an injunction. On 8th August, 1890, an order was made removing the caveat. From that order the appellant now appealed.

Sections 21, 22 and 23 of the Real Property Act (26 Vic. No. 9) are as follows :—[1]

[1] Sec. 21: Any person having or claiming an interest in any land so advertised as aforesaid, or the attorney of any such person may within the time by any direction of the commissioners for that purpose limited lodge a caveat with the Registrar-General in form B. of the schedule hereto, forbidding the bringing of such land under the provisions of this Act, and every such caveat shall particularize the estate, interest, lien or charge claimed by the person lodging the same, and the person lodging such caveat shall, if required, deliver a full and complete abstract of his title."

Sec. 22: "The Registrar-General, upon receipt of any such caveat within the time limited as aforesaid, shall notify the same to such applicant proprietor, and shall suspend further action in the matter, and the lands in respect of which such caveat may have been lodged shall not be brought under the provisions of this Act until such caveat shall have been withdrawn or shall have lapsed from any of the causes hereinafter provided, or until a [*43] decision shall have been obtained from the Court having jurisdiction in the matter."

Sec. 23: "After the expiration of three months from the receipt thereof every such caveat shall be deemed to have lapsed, unless the person by whom or on whose behalf the same was lodged shall within that time have taken proceedings in any Court of competent jurisdiction to establish his title to the estate, interest, lien, or charge, therein specified, and shall have given written notice thereof to the Registrar-General, or shall have obtained from the Supreme Court an order or injunction restraining the Registrar-General from bringing the land therein referred to under the provisions of this Act."

By Sec. 4 of the Amending Act, 41 Vic. No. 18, it is provided that :—

"Where any caveat against an application to bring land under the principal Act shall have been lodged in pursuance of Sec. 21 by any person (hereinafter called the caveator) claiming such land or a portion thereof, or an interest therein adversely to the applicant, it shall not be necessary for such caveator to take proceedings in any Court to establish such claim, but the applicant may state a case for the opinion and direction of the Supreme Court upon the matter, and the caveator may apply to the said Court for an order on the Registrar-General, as provided by Sec. 23, to restrain him from proceeding till the further order of the Court, And the Court may make such an order, and may in its discretion direct the caveator to lodge in the Court on or before a certain day

[*431] J. Ashton Cross, for the appellant.

The respondent was not represented.

The judgment of the Judicial Committee was delivered by,

DAVEY, L., J :—

[His Lordship, after stating the facts, continued :] Their Lordships are of opinion that the limitation of time contained in Sec. 23 is introduced for the benefit of the applicant to enable him to obtain a speedy determination of his right to have the land brought under the provisions of the Act without being embarrassed by the filing of a caveat which is not proceeded with in due time. It was argued on behalf of the appellant that the effect of Sec. 4 of the Amending Act is to prevent the lapse of the caveat by reason of the caveator not taking any proceeding, [*432] inasmuch as it is thereby provided that "it shall not be necessary for such caveator to take proceedings," and liberty is given to the applicant to take the initiative by stating a case, and no time is limited within which the case must be stated. Their Lordships do not think it necessary to express any opinion upon this point or upon the question whether, if the caveat had lapsed, the caveator is concluded and deprived of every other means of asserting her title. Their Lordships are of opinion that the maxim, Quilibet potest renunciare juri pro se introducto, applies to this case, that it was competent for the applicant to waive the limit of the three months and the lapse of the caveat by Sec. 23, and that the resident did waive it by stating a case and applying for and obtaining an order upon the appellant to state her case, both which steps assumed an

a case on his own behalf, stating whether he claims in his own right or under another person, together with such other particulars (if any) as the Court shall think fit to order, and the Court shall thereupon direct an issue or issues to be tried by a jury as to any fact or facts, or, should no fact be in contest, may decide the matter upon the case stated. and for the purposes aforesaid may make all such orders as the Court shall think fit, and the decision of the Court finally upon the matter shall be conclusive on the parties and on the Registrar-General and commissioners, and the costs of every proceeding under this section shall be borne by the party finally unsuccessful."

proceeded on the asumption of the continued existence of the caveat. In holding that it was competent for an applicant to waive the lapse, their Lordships do not understand that they are differing from the learned judges in the Court below. In Phillips v. Martin[1] the facts were very similar to those in the present case, with the addition that issues had been settled on the cases stated and had been tried by a jury, who found against the applicant, and proceedings had then been taken unsuccessfully for a new trial ending in an appeal to this Board. In the course of his judgment on that case the Chief Justice said: "Here there is abundant evidence of waiver, and it is quite clear that a man may by his conduct waive a provision of an Act of Parliament intended for his benefit. The caveator was not brought into Court in any way until the caveat had lapsed. And now the applicant, after all these proceedings have been taken by him, after, doubtless, much expense has been incurred on the part of the caveator, and after lying by and hoping to get a judgment of the Court in his favour, asks the Court to do that which, but for some reasons known to himself, he might have asked the Court to do before any other step in the proceedings had been taken. I think he is altogether too late. It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a [*433] person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts."

Their Lordships agree with these observations of the Chief Justice, and think that they apply to the present case, notwithstanding that the respondent did not think fit to obtain a decision of the Court on the case which he had compelled the present appellant to state. Mr. Justice Windeyer distinguished the case of Phillips v. Martin[1] from the present case on the ground that the case has not gone so far as it went in Phillips v. Martin.[1] The learned Judge said: "In Phillips v. Martin[1] the

[1] 11 N. S. W. L. R. 153.

applicant brought the case before this Court, and obtained a decision, and from that decision he unsuccessfully appealed to the Privy Council, and that case was decided upon the clear principle of law that, where, although the Court has no jurisdiction, the parties have allowed it to exercise jurisdiction and to go to the length of pronouncing judgment, the unsuccessful party cannot then turn round and deny the jurisdiction of the Court. That principle, however, has no application to the present case."

Their Lordships cannot regard these circumstances as making any difference in principle. The respondent in the present case invoked the jurisdiction of the Court to compel the appellant to state her case, and the appellant did so, and no doubt incurred costs in doing so, and all the risk involved in showing her title. If it be once admitted that an applicant may waive the lapse, it is a question of fact on the circumstances of each case whether there has been a waiver or not. Their Lordships agree with the observations of Mr. Justice Stephen on this part of the case. Their Lordships will therefore humbly advise Her Majesty that the order appealed from be reversed and the original motion refused with costs. The respondent must also pay the costs of this appeal.

Solicitors:—Parker, Garrett & Parker, for the appellant.

SUPREME COURT, VICTORIA.] [17 V. L. R. 108 (1891);
[ALSO REPORTED 12 A. L. T. 207.

In re ANNAND.

Transfer of Land Act, 1890 (No. 1149), s. 145—Practice—Proceedings to remove caveat—Costs.

The committee of a lunatic resident in England had power given to him by the English Courts to sell the property of the lunatic in Victoria. The next-of-kin of the lunatic lodged a caveat to prevent any dealings in respect of the land. The attorney-under-power of the committee of the lunatic applied by way of motion to have the caveat removed.

Held, that the attorney-under-power was entitled to make the application, and that the next-of-kin had no power to lodge the caveat. Proceedings under Sec. 145 of the Act may be taken either by way of motion or by summons.

The Full Court has power to deal with the question of costs in proceedings to remove a caveat.

This was an application by motion to remove a caveat under Sec. 145 of the Transfer of Land Act 1890. The application was made on behalf of the attorney under power for the committee [*109] of one George Annand, a lunatic. The committee had been given power to deal with the real estate of the lunatic by the English Courts. The caveators were the next-of-kin of the lunatic.

Weigall, in support of the motion.

Hayes to oppose on behalf of the caveators—These proceedings should have been taken by way of summons, and not by motion. By Sec. 145 of the Transfer of Land Act, 1890, a person may, "if he think fit, summon the caveator to attend before the Supreme Court." The practice has never been clearly defined.

Weigall :—The practice has been to proceed by way of motion. The proceedings may be by motion or by summons, and if the caveator receives due notice to appear, and does appear, then the Court may deal with the application.

Counsel referred to ex parte Vincent.[1]

Per curiam. We think that the caveator may be brought before the Full Court either by a Judge's summons or by a notice of motion. A notice of motion or a summons will serve "to summon" the caveator before the Court within the meaning of Sec. 145. We will hear the application.

Weigall in support of the motion :—The caveators had no power to lodge a caveat. They claim to be the next-of-kin of a living person ; they have no interest which could possibly be the subject of a caveat. The only persons who can lodge a caveat are beneficiaries and those who claim an interest in the land.

[1] 8 A L. T. 181.

[Counsel was stopped by the Court.]

Hayes :—The committee cannot apply to remove the caveat, as he is not the proprietor of the land, and does not come within the meaning of Sec. 145. I cannot contend that the caveators have any interest in the land, or that they are beneficiaries.

Per curiam. [Higinbotham, C.J., and a'Beckett and Hodges, JJ.].—We think that the applicant has a right to take steps to remove the [*110] caveat, and that the caveators had no power to lodge such caveat. The motion will be granted, with costs.

Hayes :—The Court has no power to order costs.

Weigall :—Under Sec. 145 the Court may make such order as may be just, and that would include costs. Sec. 218 makes the Rules of the Supreme Court applicable to proceedings under this Act, and by Order LXV., r. 1, the applicant would be entitled to costs.

[Higinbotham, C.J.—There appears to be no express power to give costs. It is very desirable that the practice should be settled definitely.]

Cur. adv. vult.

Higinbotham, C.J., delivered the judgment of the Court. [Higinbotham, C.J., a'Beckett and Hodges, JJ.]—This was an application on motion by notice to remove a caveat under Sec. 145 of the Transfer of Land Act, 1890. The motion was granted ; the question of costs was reserved. In the case of the Caveat of Turner,[2] it was held by Williams, J., upon an application to remove a caveat under the corresponding section of the "Transfer of Land Statute" (No. 301), that as no provision for costs was made by that section, a Judge had no power to grant costs on such an application. We think that that ruling cannot be upheld. By Order LXV., r. 1, it is provided that "subject to the provisions of this Act and these Rules the costs of and incident to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court." It

[2] 7 A. L. T. 75.

has been held by a Court of Appeal in England, upon the language of the Judicature Acts and of a rule in the same terms as the Victorian rule above cited, that the Judicature Acts and the rule do not enable the Court or a Judge to order costs to be paid by persons who, before the Acts came into operation, could not have been ordered to pay them; but that the true construction of this rule is that it was only intended to regulate the way in which costs were to be dealt with when power was given to the Court, or [*111] independently of an Act of Parliament, the Court had power to deal with costs: Re Mill's Estate, ex parte Commissioner of Works and Public Buildings,[3] following Foster v. Great Western Railway Company.[4] The construction of this rule, adopted by the English Court of Appeal, may be fairly open to argument, and it seems to be inconsistent with the decisions in Fahey v. Ivey & Anr,[5] which is based on a larger construction of Order LXV., r. 1. The decision of the English Court is not binding upon this Court, but in accordance with our practice in the analogous case of a decision of a Court of Appeal in England upon the terms of an English Act of Parliament, identical with those of a Victorian Act of Parliament, we adopt and follow it. The power of the Court to deal with costs on applications in caveat proceedings, before the coming into force of "The Judicature Act of 1883," appears from two cases: Power v. Smith[6] was decided under Sec. 24 of the "Transfer of Land Statute" as to a caveat against bringing land under the operation of the Act. It appears, not in the report but in the order drawn up, that the summons in this case was dismissed with £3 3s. costs. In ex parte Gunn,[7] which was also under section 24, the Court held that the case was not one for costs, an observation which assumed that costs could be given. In both of these cases the

[3] 34 Ch. D. 24.
[4] 8 Q. B. D. 25.
[5] 6 A. L. T. 26.
[6] 6 W. W. & a'B. (L.) 81.
[7] 3 V. L. R. (L.) 36.

question of costs was considered by the Court, and they must be taken as showing what the then existing practice was, and that the Court held that it had power under the statute to deal with costs upon applications under the caveat sections. If the Court possessed the power to grant costs before "The Judicature Act, 1883," came into operation, that power has not been taken away by the Act or the rules made under the Act. We grant the costs of this motion.

Solicitors for the applicant:—Blake & Riggall.

Solicitors for the caveators :—Taylor & Russell.

VICTORIA.] [10 V. L. R. (E.) 186 (1884).

MOLESWORTH, J.] [ALSO REPORTED: 6 A. L. T. 34.

CROW v. CAMPBELL.

Trustee and cestui que trust—Land purchased on security of trust estate—"Statute of Frauds"—Consideration—Void agreement—"Transfer of Land Statute" (No. 301), s. 50—Voluntary conveyance—Nominal consideration—Practice of Office of Titles.

Land purchased by a trustee with money raised by mortgage of the trust estate declared subject to the same trusts.

An ante-nuptial agreement, void under the Statute of Frauds, cannot form a valuable consideration for the conveyance of land after the marriage.

Sec. 50 of the "Transfer of Land Statute" (No. 301) does not apply to a voluntary transfer of land.

An administratrix held, as part of the intestate's estate, land (lot 6) of which the intestate was at his death proprietor in fee under "The Transfer of Land Statute" (No. 301), and other land (lot 7) of which he was tenant only. She purchased the latter, mortgaged both lots to secure the payment of the purchase money, and became in her own name registered proprietor in fee of both, subject to the mortgage. She then married again, having before the marriage had an agreement (not in writing) with her proposed husband, who did not know that she held as administratrix, that if he would expend money in improvements on both lots and pay off the mortgage, she would transfer lot 7 to him. After the

marriage he expended considerable money in improving them ; she transferred lot 7 to him for the nominal consideration of £5, and he became registered proprietor of it. In a suit for the administration of the intestate's estate :—

Held—That both lots were subject alike to the trusts of the administration ; that the agreement before marriage was void under the Statute of Frauds, and formed no valuable consideration for the transfer of lot 7, and that the transferee was not protected by Sec. 50 of the Transfer of Land Statute (No. 301).

Semble—The practice of the Office of Titles of endorsing on a certificate of title issued on a voluntary transfer a reference to the liability of the title to be defeated by creditors of the transferor is wrong.

The wife allowed leave to answer separately.

Suit by the children of Alexander Crow deceased intestate against his widow and administratrix, Mary Anne Campbell, who had married again, and Alexander Campbell her husband, for the administration of the estate of the intestate.

The wife obtained leave to answer separately.

Alexander Crow was tenant of lot No. 7 of sec. H, Ballarat, on which there was an hotel ; and owner in fee and registered proprietor of an adjoining lot No. 6, on which there was a billiard room used with the hotel. Both lots were held under the Transfer of Land Statute (No. 301).

In 1877 he died leaving a widow, the defendant, Mary Anne, and eight children, the plaintiffs. The widow carried on the business as her own, and in July, 1878, took out administration [*187] to Crow, and paid his debts, funeral and testamentary expenses. She then purchased the fee of lot No. 7 for £650, securing the payment of the purchase money by mortgaging lots 6 and 7, and became the registered proprietor of both, subject to the mortgage. On 29th March, 1880, she married the defendant, Alexander Campbell, who owned comparatively large property. The hotel business and premises were then in a bad condition.

Campbell asserted that before marriage he had a conversation with Mrs. Crow, and on her telling him that everything about the hotel was hers, and about the purchase of the hotel and mortgage, he entered into an oral agreement with her to marry her and spend his

own money in putting the place in repair and paying off the mortgage, he getting lot 7 and the hotel for himself, lot 6 being held by Mrs. Crow clear of the mortgage, for the benefit of Crow's children. She, as witness for the plaintiffs, said there was no contract, but merely a conversation as to her pecuniary affairs. The hotel was worth about £1,000. After the marriage, the defendant Alexander put the hotel in repair, bought some new furniture, carried on the business, and had the license transferred to himself. At the end of January, 1882, the value of the hotel was more than £2,000.

On the 9th February, 1882, a transfer of the hotel under the "Transfer of Land Statute" (No. 301) was made to Campbell by his wife as for the expressed consideration of £5. The mortgage was paid and a certificate of title to lot 7 was issued to Campbell and of lot 6 to his wife.

Quarrels arose between Campbell and the plaintiffs, and about January, 1884, Mrs. Campbell left the hotel and got her solicitor to demand a separate maintenance. The plaintiff's solicitor then claimed that the properties were to be regarded as having been held by the administratrix in trust for herself and the plaintiffs, and the bill sought to enforce that claim.

Mr. a'Beckett and Mr. Neighbour, for the plaintiffs:—

The alleged contract relied on by Campbell is not a sufficient consideration for the transfer by his wife to him, it was an ante-nuptial conversation only, and not in any sense a contract. But even if it were a contract, it was not in writing and, therefore [*188] void under the Statute of Frauds, and could not form a good consideration for the transfer, Warden v. Jones ;[1] besides it was a contract between an intending husband and wife to the detriment of the wife's children by her former husband.

The transfer states the consideration as £5, whereas the value of the property was over £2,000. The understanding to pay the mortgage (£650) does not make a

[1] 2 De G. & J. 76.

good consideration : In re "The Land Tax Act, 1877," ex parte Finlay.[2]

When allotment No. 7 was purchased by Mrs. Campbell, by means of moneys raised on the security of the intestate's estate, it became part of his estate. Campbell acquired no right in the property by reason of the marriage, as it was after the Married Women's Property Act (No. 384) ; besides, she was administratrix : Bright on Husband and Wife, vol. I. p. 39.

We ask that allotments Nos. 6 and 7 may be sold, and the shares of the adult children paid to them, and those of the infants invested. Past maintenance may be set off against past income. As Campbell has asserted a claim which he cannot maintain, he should pay the costs of the suit.

Mr. Topp, for the defendant, Mrs. Campbell.

It lies on Campbell to prove that he is a bona fide holder for value without notice of the trusts of the administration, and he has not done so.

The recital that the consideration for the transfer was £5 is false, and a false recital is one of the strongest indicia of fraud. Mrs Campbell, as in Reed v. Buck,[3] had no legal advice when she made the transfer. She acted solely on the directions of her husband. [Mr. Justice Molesworth—If a married woman, having separate property, gives it to her husband, am I to decide whether she was a fool or not in signing it away ?]

Mr. Higgins, for the defendant, Alexander Campbell:

This is an attempt to get back property which has become more valuable since its transfer.

The plaintiff's argument rests on the assumption that the contract is executory, for the Statute of Frauds applies only to [*189] executory contracts. But it is not so, for Campbell is the registered proprietor under the Transfer of Land Statute (No. 301).

There was nothing on the register to show him that Mrs. Campbell was an administratrix, and, as there was

2 10 V L. R. (E.) 68

3 10 V. L. R. (E.) 33.

no fraud, he is protected by the Transfer of Land Statute (No. 301), Sec. 50. [Mr. Justice Molesworth:—A woman who is the registered proprietor of land (her title being only as an administratrix) marries a man who does not know she is an administratrix. If it had been her own it would continue to be so after the marriage, and if it so continue, is there anything to prevent her assigning it to her husband? Would the operation of the Transfer of Land Statute apply?] I apprehend the statute would apply. It places him in such a capacity that he can contract with her as though she were a stranger; and under the Married Women's Property Act (No. 384) it is quite competent for them to contract, although there be no valuable consideration. The wife willingly allowed the license to be transferred to her husband's name, which supports his contention as to the ante-nuptial agreement.

In this case the false recital of the £5 consideration is not an indicium of fraud, as it arises merely from the practice of the Office of Titles in requiring some pecuniary consideration to be stated. The office will not recognize a title as absolute unless some money consideration be inserted: a'Beckett, Transfer of Land Statute (2nd edition), 119. [Mr. Justice Molesworth:—That seems rather an odd course for the office to pursue. Does the office hold that a voluntary settlement of land cannot be registered as passing the title?] They endorse on the certificate of title, "Subject to the possibility of the transfer being upset under the Insolvency Statute, 1871, and the Statute of 13 Eliz. c. 5." [Mr. Justice Molesworth:—Is it only with reference to those Acts that that is inserted? Do they allow it to have operation as a transfer?] They merely say that the statute will not protect a settlement for which there is no money consideration. [Mr. Justice Molesworth:—Then they are wrong, because the certificate would equally give no title against a subsequent purchaser for value. I do not see why the office should take upon itself to protect one class of interests and not another. It ought to [*190] do one thing or the other.]. In War-

den v. Jones[4] there was no part performance, and the settlement was held void as fraudulent against creditors. [Mr. Justice Molesworth :—There is one part of the case which has been overlooked, viz., as to the business This is the case of a woman having taken out administration carrying on business after the intestate's death. If the plaintiffs succeed as to the hotel, have they not a right to succeed also as to the business ?] The plaintiffs do not ask for that, but only for the land and furniture. The license has been transferred into Campbell's name. [Mr. Justice Molesworth :—I think she intended to give Campbell everything, but the question is whether she could.] She was only a constructive trustee of lot 7, it was not purchased with moneys of the estate. She undertook the risk of mortgaging part of the estate, but that mortgage has now been paid off, and the estate has sustained no loss.

Campbell is quite willing that there should be an inquiry as to the rent of lot No. 6, for he has spent more money on it than has come out of it. If the business does not belong to him he is entitled to an inquiry as to the maintenance and education of the children.

Mr. a'Beckett in reply :—

The practice of the Office of Titles is as alleged ; but whatever equities would attach to the property when in the transferor would attach to it when in the transferee. In Chomley v. Firebrace[5] your Honour held that where the transferee was innocent of fraud he was protected by section 50 of the Transfer of Land Statute (No. 301), but the Full Court held that if the fraud were in the transferor, it was sufficient. There must be distinct evidence of the ante-nuptial agreement before the Court will act on it : Alderson v. Maddison.[6]

Cur. adv. vult.

Mr. Justice Molesworth :—Mr. Alexander Crow carried on business as keeper of the St. Mungo Hotel,

[4] 2 De G. & J. 76.

[5] 5 V. L. R. (E.) 57

[6] 7 Q. B. D. 174.

Ballarat; he was tenant of lot No. 7, sec. H, and acquired the freehold of an adjoining lot, No. 6, on which there [*191] was a billiard room used with No. 7. He died November, 1877, leaving a widow—the defendant Mary Anne (now the wife of the defendant, Mr. Campbell)—and eight children, the plaintiffs. The widow treated the property as hers, carried on the business, maintaining herself and family, except the oldest son, Alex. Brown Crow, who was in a railway office supporting himself from 1876.

She took administration to her husband in July, 1878, representing his real property as under £200, his personal as under £260. She paid all his debts, funeral and testamentary expenses. She purchased lot No. 7 from the landlord for £650, securing that price with interest at 10 per cent. by mortgaging Nos. 6 and 7 to Deveson. Under the Act, No. 301, she was proprietor of both, subject to the mortgage. She married the defendant Campbell on 29th March, 1880, who also carried on an hotel business and a trade in coal and wood at Haddon, and had comparatively large property.

She, as witness for the plaintiff, says that there was no contract before their marriage; that he made some inquiries as to her pecuniary position. He says that she said that everything about the hotel, etc., was hers, that she had bought the hotel, but did not pay for it, but gave it and the billiard room as part security for the price; that she said she was a little in debt, £70 or £80; that he said that if he married her, and came and spent his money putting the place to rights, he must have the hotel in his own name, not hers. She said he should have that, but she should like to have the billiard room for the children; that he said she should have it clear of the mortgage. She expressed thanks, and he said he would not have it transferred until the mortgage was up; that they discussed the discretion of her having purchased the hotel; that he told her that the hotel was not fit to live in as it was; that she said that she had no money to repair it; that he said that it would take much money to repair it. She said

that if it was put right it would improve the business very much, and that she was doing no business in the house then.

In fact, from the entire evidence, I would say that the business was doing badly. She had sold the billiard table for £80, owed some, not considerable, business and other debts, and the hotel was worth about £1,000, subject to the mortgage for £650.

[*192] He put in some furniture before, more after, the marriage. He from the marriage acted as master of the property, carried on the business in all important points, and had the license transferred to him. She and her eldest daughter generally acted at the bar, and she kept the accounts, mixing the receipts at the bar with other moneys passing through her hands, helped herself at discretion, defrayed all small house and family expenses, mixed together, as might have been expected if he married another woman accustomed to such business, and took the support of her family. All the bar takings were put into a till, which he emptied and lodged to his general bank account. He quarrelled with one of the plaintiffs, Louis, the second son, and sent him out to support himself. He expended much money, he says over £400, in improving the hotel. Its business increased. At the end of January, 1882, the value of the hotel had increased to more than £2,000, the furniture of 1880 had been generally laid aside, and other and better had been substituted. There had been some disputes between Campbell and his wife. He complained of extravagance, talked of being driven to the Insolvent Court. On 29th January, 1882, for the first time, the plaintiff, Alexander Brown Crow, had a dispute with Campbell in her presence. Campbell said the place was his and he would allow no interference with it. The son said otherwise, and that Campbell could not pretend to have bought it by an outlay of £150. The mother heard them, and took no part.

About that time Campbell, as he says, according to the pre-contract, called upon his wife to transfer the hotel to him. She says she did not understand the

meaning of the transfer, which, in fact, was made on 9th February, 1882, under the Act No. 301. Mr. Mann, Campbell's solicitor, prepared it by his instructions. It was as in consideration of £5. As brought to her it included lots Nos. 6 and 7, contrary to Campbell's version of the agreement, but admitting explanation from Mann, being informed by the deeds, which mixed the properties. The wife objected to the transfer of lot 6, saying she thought it was to be left for the children, which supports Campbell's version of the pre-contract; and, in fact, the mortgage to Deveson was paid, the certificate of title to lot No. 7 was issued to Campbell, and of No. 6 to his wife [*193], and the manner of dealing with the hotel, etc., was resumed. But their disagreements increased. Campbell complained that he did not get all the money which went or should have gone to the till, and ultimately, about January, 1884, he ordered the oldest daughter to leave the bar. The wife withdrew from it and interference with the hotel, and got a solicitor to write to Campbell demanding a separate maintenance from incompatibility of temper of themselves and their respective children. Another solicitor, acting for the plaintiffs, put forward their claim to the properties to be regarded as a trust by the administratrix for the plaintiff, Alex. B. Crow and the infant children. That case is sought to be enforced by this bill.

I think that the widow, using lot No. 6 as she did for acquiring No. 7, would make Nos. 6 and 7 alike subject to the trusts of administration alike. I doubt whether Campbell should take subject to such trusts, if the property were conveyed to him without regard to the Act No. 301. There is no direct evidence that he knew she was the administratrix. He knew that Crow had occupied both the properties, that she had succeeded him, and had mortgaged lot No. 6 to buy No. 7. But married women having property independent of their husbands is now a common thing here; and even if he inferred that she derived from Crow, it would not follow that she took it as his administratrix, it might as probably be as her devisee. Her treatment of the pro-

perty was quite contrary to her duties as administratrix—carrying on business herself, mortgaging lot No. 6 in order to buy No. 7.

I do not adopt the version of either Campbell or her as to the agreement before marriage. By the Statute of Frauds it was inoperative, being verbal. Besides, it was indistinct. I do not think that the document of 9th February, 1882, is subject to the imputation of being improperly obtained from a woman insufficiently advised. I think she knew what she was about sufficiently, and had the powers of a proprietor under the Act No. 301. She had obtained the certificate, and the transfer spoke plainly for itself.

Campbell's credit has been attacked, saying he would defer the transfer until Deveson's mortgage was due, and seeking it before. He says Deveson told him the mortgage would be due in [*194] 1882, and he believed him ; and what proves his statement is that Deveson did, in fact, at the time of the transfer, reduce interest to 6½ from 10 per cent. for the next year. If there was a contract distinctly made for the transfer of 1882, I would hold the conveyance to Campbell effectual, and protected by the Act No. 301, s. 50, from all notices of trust. In Chomley v. Firebrace[7] a trustee being in default as to one set of persons, transferred the property which he held as trustee for another, under the Act, to the first set, all of his own motion and without communicating with the principals, to compensate for his default. I held that, as the transferees were innocent, and might lawfully take, they were protected by section 50. The other judges differed from me on appeal. I have considered their judgments and some other cases referred to in a'Beckett's Transfer of Land Statute (2nd edition) upon that section. "No person contracting or dealing with, or taking or proposing to take a transfer from the proprietor of any registered land shall be required or in any manner concerned to inquire or ascertain the circumstances under, or the con-

[7] 5 V. L. R. (E.) 57.

sideration for which such proprietor was registered, or shall be affected by notice, actual or constructive, of any trust or unregistered interest," etc.; and in deference to the views of others principally, am prepared to decide that the section does not apply to a transaction such as this, without consideration at the time of the transfer or previous legal obligation to transfer.

The nominal consideration of £5 I consider immaterial. It was introduced, I believe, according to an old habit of conveyancers in voluntary transactions, and is not, I think, a badge of fraud. It was talked of. It seems there is a usage in the Titles office to act as to issuing certificates of transfer upon the insertion of nominal considerations; see a'Beckett's Transfer of Land Statute, 2nd edition, 119. I am unable to see any good reason for this course.

Campbell has since mortgaged this property under the Act No. 301. I hold both defendants bound to convey those lots, Nos. 6 and 7, upon the trusts of the administration of Crow's estate, as to which, I think, it should be divided like personal estate into three parts—two-thirds to the plaintiffs equally, [*195] and the remaining third to the defendant Campbell in his marital right.

In cases of this class it is impossible to work out rights in minute detail. Campbell has been receiving the income belonging to the family and maintaining them. I shall set them off. So as to her receiving and applying income. He should be allowed, I think, for lasting and permanent improvements on lot No. 7. He got possession of the furniture of Crow and mixed it with purchased furniture. I shall hold him liable for the value of the furniture which came to his possession and authorize him to keep that now in the hotel. I think Campbell should be directed to hold the license for the trust. I shall order him to pay the plaintiff's costs of suit.

Solicitors for plaintiffs:—Smale, Hamilton & Wynne, for Cuthbert and Wynne, Ballarat.

Solicitors for the defendant Mary Anne Campbell,—Davies & Campbell for Holmes & Salter, Ballarat.

Solicitors for defendant Alexander Campbell:—Madden & Butler for Mann, Ballarat.

SUPREME COURT, VICTORIA, 1878.] [5 V. L. R. (E.) 57.

CHOMLEY v. FIREBRACE.

"Transfer of Land Statute" (No. 301), s. 50—Solicitor and client —Mortgage notice—Breach of trust—Fraud—Evidence—Admissions against interest.

A., a solicitor was the survivor of two trustees of a settlement, under which they had power to invest and to vary investments with the consent of the tenant for life, and the tenant for life had power to appoint new trustees, which was never exercised. A. was also attorney under power of the defendants, trustees, to invest money. He invested moneys of the settlement trust in his own name upon mortgages, one under the "Transfer of Land Statute" and paid the income to the tenant for life, rendering signed accounts referring to them. Shortly after, being indebted to the defendants, he, without the consent of the tenant for life, drew and executed transfers of the mortgages to them, untruly reciting receipt of the consideration moneys. Two days after he killed himself, dying in insolvent circumstances. Upon bill by new trustees of the settlement against the defendants, seeking a retransfer of the mortgages :—

Held—On appeal (affirming the decision of Molesworth, J.) that as to the mortgages under the old law, the defendants should be deemed to have had notice of A's breach of trust, and should re-transfer the mortgages to the plaintiffs; and reversing the decision of Molesworth, J.), that the same principle applied to the mortgage under the "Transfer of Land Statute."

The doctrine of constructive notice is not affected by the "Transfer of Land Statute" (No. 301), s. 50, as protecting a purchaser.

A trustee having invested trust moneys upon several mortgages in his own name, rendered accounts to the cestui que trust signed by him, giving credit for sums received for interest upon such mortgages.

Held—That these documents were sufficient evidence of the trust, notwithstanding the Statute of Frauds, and were admissible in evidence against persons claiming as assignees from him, after his death, as being admissions by a deceased person against his interest.

The "Transfer of Land Statute" (No. 301), s. 50, should be construed strictly, its exceptions liberally. Fraud in that section applies equally in the cases of fraud by a purchaser, and by a vendor.

Suit by A. W. Chomley and H. J. Henty, trustees of a settlement, 29th September, 1862, against Anne Fire-

brace and Robert Tarver Firebrace, seeking for a declaration of title to certain mortgage securities transferred by E. J. Murphy to the defendants.

By indenture of settlement of the 29th September, 1862, upon the marriage of Mary Martha Murphy and John Steavenson, a sum of £5,000 was vested by John Robert Murphy in Edward Joseph Murphy and John Terry Murphy, upon trust to invest and pay the income thereof to M. M. Murphy for life, and, after her death, to J. Steavenson, for his life, and after the death of the survivor, upon certain trusts for the benefit of the children of the marriage; and, if there should be no child, in trust for J. R. Murphy, with power for the trustees at the request of M. M. [*58] Murphy to sell any investment and hold the proceeds upon the like trusts. The power to appoint new trustees in the event of the death of any trustee was exercisable by M. M. Murphy by deed; and, thereupon, the investments and estate should be transferred to and vested in the new trustees, and the receipt of the trustees for any securities transferred or money paid to them should be a good discharge.

The marriage took place on the 30th September, 1862. J. T. Murphy died on the 27th July, 1872. No new trustee was appointed; and all moneys of the trust were subsequently invested in the name of E. J. Murphy alone.

By an indenture of mortgage on the 17th April, 1874, Richard Youl and Joseph Anderson Panton conveyed certain lands in the county of Evelyn (subject to a prior mortgage to John Manifold to secure £10,000) to E. J. Murphy, to secure £2,000 with interest at 8 per cent.; and the same sum and interest was also secured by a mortgage of that date under the Transfer of Land Statute from them to E. J. Murphy of certain other lands at the same place, and subject also to the mortgage to Manifold. By an indenture of mortgage of the 1st October, 1874, Thomas Wykes Hall conveyed certain lands at Kyneton to E. J. Murphy, to secure the sum of £1,000 and interest at 8 per cent. By an indenture of mortgage of the 7th October, 1874, Thomas Bathie Reid con-

veyed certain lands in North Melbourne to E. J. Murphy, to secure £400 and interest at 8 per cent. These three sums of £2,000, £1,000, and £400 formed part of the settled estate, and the interest on these mortgages was duly accounted for and paid to Mrs. Steavenson by E. J. Murphy.

By three indentures of the 28th October, 1875, and by a transfer under the statute, E. J. Murphy transferred the beforementioned securities to the defendants for the considerations of £2,012 5s. 5d., £1,006 2s. 8d., and £402 9s. 1d., respectively therein expressed to have been severally paid by them to him. The bill alleged that in fact such sums were not so paid, and that the indentures and transfer were executed without consideration, for some fraudulent purpose of E. J, Murphy's, without the knowledge or consent of any of the persons interested under the settlement. The bill also alleged that the transfers were not [*59] executed in pursuance of any contract or dealing with the defendants, and that they were prepared by E. J. Murphy himself; and charged that the defendants had, through him as their solicitor, notice that the execution of the transfers was without any consideration, and fraudulent against the persons interested under the settlement and a breach of its trusts.

E. J. Murphy committed suicide on the 30th October, 1875, and died intestate, and in insolvent circumstances. On the 25th November, M. M. Steavenson appointed the plaintiffs new trustees of the settlement. The Curator of Intestate Estates obtained a rule to administer the estate of E. J. Murphy, and delivered, 2nd December, to the defendants the several transfers of the three mortgages. The plaintiffs filed this bill for a declaration that the transfers were without consideration, and fraudulent, and for the execution of re-transfers to the plaintiffs.

The defendants, who for many years resided in Europe, by their answer stated that they were the trustees of the will of the late Wm. Firebrace, and that E. J. Murphy acted for many years as their attorney, under

a power which did not authorize him to prepare deeds or otherwise act as their solicitor ; that at the time of the transfers Murphy, as such attorney, had large sums of money of the defendants in his hands for investment ; and that the considerations for them were paid thereout, it being his duty to invest such moneys.

The evidence is fully stated in the judgment of His Honour Mr. Justice Molesworth.

Mr. Holroyd and Mr. a'Beckett for the plaintiffs :— The defendants are mere volunteers, and therefore are in no better position than E. J. Murphy . No consideration passed from the defendants to the plaintiffs upon the transfer of the mortgages. The estate may therefore be followed into their hands. Lewin on Trusts (6th edition), 699 ; Spurgeon v. Collier,[1] Mansell v. Mansell,[2] Thorndike v. Hunt.[3]

Further, the transfers were made without the consent of Mrs. Steavenson, and therefore Murphy committed a breach of trust. The defendants had constructive notice thereof, through him as [*60] their solicitor and attorney under power, and are bound to replace the loss occasioned by such breach of trust, Boursot v. Savage,[4] Atterbury v. Wallis.[5] One of the mortgages being a second mortgage was of an equitable interest only, and therefore the defendants would take subject to the equities, Stackhouse v. Countess of Jersey.[6]

The evidence is clear that the transferred securities formed part of the estate of Mrs. Steavenson ; the admissions of E. J. Murphy being against his interest are admissable evidence, Taylor on Evidence (7th edition), 580; Woolway v. Rowe.[7] It is admitted that the transaction was within the authority of the power of attor-

[1] 1 Ed. 55.
[2] 2 Pr. Wms. 678-680.
[3] 3 De G. & J. 563.
[4] L.R., 2 Eq. 134.
[5] 8 D. M. & G. 454.
[6] 1 J. & H. 721.
[7] 1 A & E. 114.

as old debts were paid off he received and kept the money in his hands until opportunities offered for re-investment.

The subject of this suit is, four mortgages executed to Murphy, the two first for one sum, dated April 17, 1874, by Messrs. Youl and Panton, one of land of ordinary tenure, the other of land under the "Transfer of Land Statute," both of equities of redemption ; a third dated the 1st October, 1874, by Mr. Hall ; and a fourth, dated 3rd October, 1874, by Mr. Reed, of an equity of redemption. These mortgages together were for £3,400, and bore interest each at 8 per cent.

Murphy owed much more than he was worth, but preserved his credit, and apparently was not pressed by creditors. He had in his hands about October 29, 1875, money of the Firebrace trust received from time to time, more than £3,500, and he then stated to his clerk, untruly, that Mrs. Steavenson wanted to apply her settlement money otherwise, and directed him to prepare assignments of the above four mortgages from him to the defendants, as upon payment of sums equal to the principal, and small amounts of interest due upon them respectively. These assignments as to lands of ordinary tenure were affixed to the respective mortgages with receipt for consideration, endorsed, duly executed by Murphy, 28th October, and the mortgage under the Transfer of Land Statute duly assigned, there being no actual or symbolic payment of money, and no communication with anybody on the subject except the clerk, who, by Mr. Murphy's directions, altered the mortgage books, passing them from one list of mortgages held for Mrs. John Steavenson's trustees to the other, and in his cash book crediting the one and debiting the other fund as for so much cash paid, £3,420 17s. 2d. He killed himself on the 30th, [*63] and the above deeds and dealings were afterwards disclosed to the parties interested. (Steavenson and wife and Ed. Bell Firebrace immediately, the defendants in course of post), and reconveyances were at once demanded.

The defendants insist—firstly, that there is no evidence against them that the mortgages were for money

part of the settled £5,000, and that there is no written declaration of trust of them. The payment of the £5,000 is admitted by the trustees executing the settlement, as stated generally by Mrs. Steavenson's evidence. The disposal of the £5,000 from time to time appears in the above book kept by the direction and under the superintendence of Murphy, so that there is no doubt of the earmarking of those mortgages to ordinary apprehension. There are in evidence documents having Murphy's name written by him ; as to Reid's mortgage memorandum of instructions for its preparation, 25th April, 1875, describing the property, the sum of £400, the rate of interest, and the time of payment ; as to Hall's mortgage, a receipt, 22nd April, 1875, by Murphy for half year's interest on mortgage to Mrs. Steavenson's trustees up to and ending 1st April, 1875 ; as to Youl and Panton's mortgages, a receipt, 16th July, 1875, for a quarter's interest on mortgage to Mrs. J. Steavenson's trustees up to 1st July, 1875 ; as to Youl & Panton's mortgages, a letter 26th July, 1875, Murphy to Steavenson, with a cheque for £50 on account of Mrs. Steavenson's income for the July quarter, accompanied by an account signed by Murphy, giving credit amongst others, for the interest to 1st July, received from Youl and Panton ; and there is further a letter, 18th October, 1875, from Murphy to Steavenson, enclosing Mrs. Steavenson's income account for quarter ending 1st October, with a cheque for amount to credit. The accompanying account signed, by Murphy, giving credit amongst others for Youl and Panton's interest, Hall's interest, and Reid's interest, 18th May to 1st October, 1875, (which last was payable on that day, but which he had not in fact received).

These documents appear to me to be sufficient evidence of the trust. They are admissions by a deceased person in the ordinary course of business, by a person through whom the defendants claim the mortgages ; and I think, as against the interest of [*64] Murphy conflicting with his apparent right to the mortgages for his own benefit. I have been pressed with argument that these were not statements against his

interest, as they tended to discharge him from a liability to invest. But in those cases of admissions one might generally find something which could be regarded as favourable to the person making them. If the money is sufficiently earmarked, it being applied would constitute a trust, notwithstanding the Statute of Frauds.

We have Murphy, then, for some motive of preference not disclosed in evidence, attempting to apply property which he held upon one trust to discharge his debts as a defaulter upon another trust. Murphy might in one capacity deal with himself in another. If he was in no default, and had Mrs. Steavenson's consent, it would be a legitimate transaction to buy her trust securities with money of the Firebrace trust in his hands and keep it for her trust, and work the transaction by deeds of assignment such as he executed, and the application of the Firebrace trust money would be sufficient consideration for the assignments to the defendants.

But the plaintiffs insist that Murphy, as solicitor, acted for assignor, himself, and assignees, defendants, in the assignments of 28th October, 1875; that he was guilty of breach of trust in disposing of the mortgages without Mrs. Steavenson's consent and appropriating the proceeds to his own use, and that through him, the defendants should be deemed to have had notice of this, and cannot keep the benefit of the assignments. In fact, the defendants had no mind in the matter, they were represented by a mind fully informed of the fraud. There are old authorities which would fully sustain this argument, for instance, Sheldon v. Cox,[11] where even a registered deed was held to lose its priority. But a distinction has been regarded in modern cases, that where a solicitor is guilty of fraud personally, he should not be supposed to communicate the facts to a subsequent purchaser, and should not affect him with notice : Kennedy v. Green,[12] Atterbury v. Wallis,[13] Boursot v. Sav-

[11] 2 Eden. 224.

[12] 3 M & K. 699.

[13] 8 D. M. & G. 454.

age,[14] Waldy v. Gray.[15] But this [*65] distinction, again, is qualified in some of these cases by saying that if an unconnected solicitor employed in the second transaction would have discovered the fraud, notice should be attributed to the purchaser in it.

As to the present case, if a solicitor other than Murphy had acted for the defendants, he would in the ordinary course of dealing have applied to the mortgagors for information as to their subsisting liability. (See Sugden on Vendors and Purchasers, 197), also, perhaps to give notice of the intended assignment. If so, he would probably have learned from them of the trust of which they were informed. In this view the plaintiffs should have priority.

There is a view which has been pressed upon my mind, upon which I have not been able to find authority, perhaps from the circumstances of the case being very uncommon, that the defendants, in fact, gave nothing for these assignments, never acted upon them before they were apprised of the breach of trust. If the assignments were set aside they would be in no worse position than if they had never been made. In a case having some resemblance to the present, Thorndike v. Hunt,[16] where a trustee had brought into the credit of a cause a sum for which he was liable for one trust, money produced by breach of another trust the beneficiaries in which sought, after an interval, to have the money replaced, and were refused, the Court noticed that those entitled under the former could not be reinstated in their position before the payment into Court. In cases where banks claim the benefit of securities deposited, as transferees of them, they have to show that they acted upon the faith of the deposit.

I do not attach importance to an argument for the plaintiffs that several of the mortgages were of an equity of redemption. Unless one of litigating parties

[14] L. R. 2 Eq. 134.

[15] L. R. 20 Eq. 238.

[16] 3 De G. & J. 563

has got a legal estate, the right to call for a conveyance of it stands, I think, in the same position as a legal estate itself would.

As to all these mortgages of lands of ordinary tenure, I am prepared to decree for the plaintiffs, with considerable doubt. But as to the mortgage of lands held under the "Transfer of Land Statute" (No. 301), by Youl and Panton, it appears to me that [*66] Sec. 50 protects the defendants' title. The matter has not been noticed in pleading or argument, and I presume that the value of this property is small. I shall hear further argument on the subject if requested, and defer the formal making of my decree for the purpose ; also for the parties to consider if the defendants should be required to account for interest on the mortgages received, or if a sum can be fixed. I think, on the whole, that costs should be given, as usual, to the parties successful in litigation. The defendants being trustees should not, I think, as between the plaintiffs and them, make any difference ; they will be probably entitled to an indemnity out of a trust fund for which they have fought a separate battle.

On this day further arguments were heard upon the question raised in the judgment, touching the mortgage under the "Transfer of Land Statute," Sec. 50.

Mr. Holroyd and Mr. a'Beckett for the plaintiffs :—There is but one debt, though several securities are held for it ; and he who is entitled to the debt or to whom it is due, should also hold all the securities. By the proviso to Sec. 59 of the "Transfer of Land Statute," the defendants are trustees for the plaintiffs, of the security under the statute. There is nothing in Sec. 50 against the right to follow a trust fund into the hands of a volunteer. The amount of interest can be fixed without a reference.

Mr. Lawes and Mr. Webb for the defendants :—The equities are equal, and the fund should therefore be apportioned. Sec. 50 protects the defendants, who had no notice of Murphy's fraud. They themselves are not guilty of fraud.

Mr. Holroyd replied :—The defendants may have an equity against Murphy's estate, but have none against the plaintiffs. There is one debt only, and it cannot be apportioned.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

I think that Murphy had received money of the defendants to invest, invested a smaller sum by making assignments of four [*67] mortgages as for the defendants, and that they might conscientiously retain these assignments, if they were not affected with notice that Murphy, in making them, was committing a breach of trust as to the Steavenson's. For the reasons I have already stated, I think that as to lands of ordinary tenure the defendants should be deemed to be so affected, because they would have got notice if they had employed an unconnected solicitor. But the policy of the Act No. 301 is to facilitate persons in dealing in land and mortgages, to act without solicitors, and reading Sec. 50 in regard to that, it, I think, protected the defendants so far as regarded land under that Act ; and that the defendants should be left the full benefit of their security for £2,000 upon land under the Act as far as they are assignees of Youl and Panton's mortgage.

Declare that the transfers of the mortgages in bill firstly mentioned from Richard Youl and Joseph Anderson Panton and of the mortgages in bill mentioned from Thomas Wykes Hall and Thomas Babtie Reid respectively executed by the said Edward Joseph Murphy to the defendants Anne Firebrace and Robert Tarver Firebrace, should be deemed ineffectual in equity as against the plaintiffs Arthur Wolfe Chomley and Herbert James Henty as trustees of the indenture of 29th September, 1862, in bill mentioned ; but that the transfer of the mortgage in bill secondly mentioned from said Richard Youl and Joseph Anderson Panton of land under the "Transfer of Land Statute" to the said Edward Joseph Murphy executed by him to the said defendants, should be valid and effectual, and the force thereof as to last-mentioned lands not affected by the directions herein-

after contained. Order the said defendants to execute proper transfers of the first-mentioned mortgages to the plaintiffs as such trustees as aforesaid at the said plaintiff's expense (to be settled by the Master in case the parties differ, and to deliver up to the said plaintiffs the said mortgages and all the title deeds of the mortgaged premises in their possession. Order the said defendants to pay the plaintiffs the interest which they have received on account of the first-mentioned mortgages taken by consent to amount to £. Order defendants to pay plaintiffs' costs of suit when taxed and refer to tax. Liberty to apply.

From this decree, both plaintiffs and defendants appealed to the Full Court.

The plaintiffs' grounds of appeal were:—

1. That the decree should be varied by including the transfer of mortgage from Youl and Panton to Murphy, of land under the "Transfer of Land Statute," amongst the other transfers, by the decree declared to be ineffectual in equity as against the plaintiffs, by directing a proper transfer of the said mortgage to the plaintiffs, as well as proper transfers of the other mortgages thereby directed to be transferred, and by directing the defendants to pay to the plaintiffs the interest (if any) received on account of the mortgage, as well as the interest received on account of such other mortgages.

2. That no consideration was given for or on behalf of the defendants for the transfer to them of the said mortgage of land under the "Transfer of Land Statute" [*68] and such transfer was the fraudulent and voluntary act of the said E. J. Murphy, and, therefore, the 50th section of the "Transfer of Land Statute" does not protect the said transfer.

3. That as appears by the evidence and found by the judgment of His Honour Mr. Justice Molesworth, no consideration was given by or on behalf of the defendants for any of the transfers by the said E. J. Murphy in the bill mentioned ; and it appears by the evidence, and by the effect thereof as stated in the said judgment, that all such transfers were made in carrying out

one and the same voluntary and fraudulent dealing by the said E. J. Murphy, and the effect of the said dealing as against the plaintiffs should be set aside wholly and not partially only as by the said decree.

4. That the said decree is not certain and effectual in favour of the plaintiffs as to the transfers, and to the payment of interest to which the plaintiffs are by the said decree found to be entitled, by reason of the declaration in the said decree contained as to the said mortgage, to a transfer of which the plaintiffs are found not to be entitled.

The defendants' grounds of appeal were as follows:—

1. That there was no legal evidence as against the defendants that the sums of £2,000, £1,000, and £400 respectively mentioned in the 8th paragraph of the bill, formed part of the moneys subject to the trusts of the indenture of settlement, of which the plaintiffs are trustees.

2. That His Honour found as a fact that E. J. Murphy did invest money of the defendants' in his hands on the assignment of the mortgages in the bill mentioned.

3. That even if the said assignment were made without consideration, the defendants had no notice, actual or constructive, of such want of consideration, or of any fraud in relation to the said assignments.

4. That in any event the decree ought to have apportioned the debt of £2,000, secured by the mortgages of Youl and Panton, between the plaintiffs and defendants rateably and in proportion to the value of the property comprised in the mortgages, to which the plaintiffs and defendants are by the said decree declared respectively entitled.

5. That upon the evidence and law applicable thereto, the bill ought to have been dismissed with costs.

6. That in any event the defendants ought not to have been ordered to pay the costs of the suit.

Mr. a'Beckett and Mr. Williams for the plaintiffs :—The defendants had constructive notice of the title of

the plaintiffs. It is not requisite, however, to rely on notice, as the defendants gave nothing for these assignments. They were mere volunteers, and Sec. 50 of the "Transfer of Land Statute" merely protects purchasers and does not protect trust property from being followed into the hands of volunteers. In this view, it is only necessary to prove that the defendants gave no consideration for the assignments, and were mere volunteers. The evidence clearly supports this. If the plaintiffs fail on that ground, the question of notice is material; the cases cited in the Court below are relied upon on this point, and establish constructive notice [*69] irrespective of the question of fraud. The fraud of the agent Murphy, is the fraud of the defendants, and is excepted by Sec. 50: Kerr on Fraud, pp. 176 et seq. By defending this suit, it may be urged, the defendants make themselves parties to the fraud of Murphy, by relying upon it.

At law, the act of Murphy would not confer any title to these mortgages; it was a fraudulent act of his, which the owners of the property never intended should take place. Murphy had no power to convey, because the consent of Mrs. Steavenson had not been obtained: Cundy v. Lindsay.[17] The plaintiffs could not sue the defendants for the consideration money if not paid, because they would thereby affirm the deeds, and be estopped by the recital of payment: Withers v. Greenwood.[18] The evidence afforded by the accounts signed by Murphy and the entries in his books, is admissible as consisting of entries against interest, and of statements against proprietary interest: Reg. v. Exeter,[19] Taylor v. Witham,[20] Middleton v. Melton.[21] Entries against interest are evidence against all the world; but if for interest, only against the party making them.

[17] 3 App. Cas. 459.
[18] 4 V. L. R., L. 491.
[19] L. R. 4 Q. B. 341.
[20] 8 Ch. D. 698.
[21] 10 B. & C. 317

Mr. Webb, Q.C., and Mr. Lawes for the defendants :—Where one of two innocent parties has to suffer for the fraud of a third, he who gives occasion to the loss must be the one to suffer, per Ashurst, J., in Lickbarrow v. Mason.[22] Mrs. Steavenson had the power to appoint new trustees but neglected to do so upon the death of John Terry Murphy, and left E. J. Murphy sole trustee, and so gave him the power to commit the fraud. Further the defendants have the legal estate : Melior est conditio possidentis ; Waldy v. Gray[23] is inconsistent with the dictum in Boursot v. Savage.[24] The knowledge of the solicitor of the fraud, would not be constructive notice to his client of that fact, which he would not divulge. [The Chief Justice.—In Waldy v. Gray,[22] the suppression was essential to the fraud ; but in this case the suppression of the settlement requiring the consent of [*70] Mrs. Steavenson, was not.] An independent solicitor acting for the defendants would have had no notice of the trusts or fraud. Murphy appeared on the deeds to be the beneficial owner. The doctrine should not be extended : Wyllie v. Pollen.[25] The onus of proof lies on the plaintiffs that these securities formed part of the Steavenson trust estate. [Mr. Justice Stephen.—The entries of Murphy in his books, amount to a declaration of trust to that effect.] They are neither in his handwriting nor signed by him, within the Statute of Frauds. [Mr. Justice Stephen.—Money invested on mortgage is not an interest in land, and a parol declaration is sufficient.] The principles are stated in Higham v. Ridgway.[26] These entries of Murphy require the word "paid" against the account to make them against the interest of the persons to whom money is due ; as they stand they are merely entries for his interest, and are no evidence that he invested the money of the Steavenson trust upon these mortgages. Consideration passed for these assignments. Murphy was indebted to

[22] 1 Sm. L. C. 681.
[23] L. R. 20 Eq. 238.
[24] L. R. 2 Eq. 134.
[25] 32 L. J. Ch. 782.
[26] 2 Sm. L. C. 318.

the defendants at the time ; he paid it by the transfer, leaving himself indebted to another person. The defendants could not repudiate the payment or investment. The actual payment of consideration was a matter for Steavenson's trustees, and not for the defendants. If Murphy made away with it, they were not liable : Bodger v. Arch;[27] Maber v. Maber;[28] Amos v. Smith.[29] As to Sec. 50 of the "Transfer of Land Statute," fraud means actual moral fraud in the transferee, it means fraud within the matter of the Act, and not fraud aliunde. [The Chief Justice.—The defendants had notice of the facts from which fraud might be deduced, although not of the fraud itself.] Notice of the fraud must be brought home to the person to be affected. Murphy could not be the defendant's agent to commit a fraud ; Robertson v. Keith.[30] [The Chief Justice :—The words "Except in case of fraud" in Sec. 50 should be construed liberally, and therefore if the person through whom the defendants claim were guilty of fraud, a small notice would suffice.]

[*71] Mr. a'Beckett in reply :—Sec. 50 contemplates fraud by the transferror, otherwise a trustee might fraudulently distribute the trust property amongst strangers, gratuitously, ignorant of the circumstances. It applies to the case of a person being on the register by the fraud of any person. There is nothing in the Statute preventing the defence of purchase for value without notice being set up.

Cur. adv. vult.

THE CHIEF JUSTICE :—

In this case Mr. E. J. Murphy, a solicitor, being indebted to the defendants, attempted to transfer certain mortgages to them in order to lessen his debt. No money passed ; and this bill is filed by the present trustees of Mrs. Steavenson's settlement, to set aside the transfers and revest these mortgages in them. A decree

[27] 10 Ex. 333.
[28] L. R. 2 Ex. 153.
[29] 1 H. & C. 238.
[30] 1 V. R. Eq. 11.

has been pronounced declaring that the transfers were void as regards certain land not brought under the Transfer of Land Statute, but valid as regards land brought under that statute. There is an appeal, and cross appeal.

Amongst other objections to the decree as to the land not under the statute, taken by the defendants, it was urged that entries made by the deceased Murphy were inadmissible as evidence. In my opinion that evidence was properly received on two grounds, as entries either made by a deceased person against his interest, or by a deceased person in the course of his business.

It was also urged that the plaintiffs were not entitled to redress, inasmuch as the principle applied, that of two innocent persons he who had in any way conduced to the injury was to suffer. It appears to me that that principle is inapplicable to the facts of the present case. The question is not whether one of two innocent persons is to suffer, but whether one person is to be deprived of an estate and another is to hold it. Nor can the case for the defendants be sustained by the contention that the cestui que trust, the wife, having power to appoint a new trustee, was to blame for not having done so; it was assumed that this misfeasance would never have taken place if there had been two trustees appointed, but there is nothing reasonably to show that [*72] the appointment of a second trustee would have prevented this occurrence. The trustee, who was a professional person, would in such a matter have been naturally trusted by his co-trustee.

Looking at this case on the principles of equity applicable to it, it appears that the defendants' agent through whom they claim, was cognisant of facts from which fraud might have been inferred, and, therefore, they took with notice of the fraud. On that ground alone the decision may be sustained. But the ground on which I should prefer to rest my judgment is that really no consideration passed in this instance. The trustee professed to transfer the mortgages from one to

the other, but it was the merest form and may properly be described as a mockery. He ruled out one entry, made another, and went through the form of signing a deed for which there was no consideration. He was aware of the fraud thus practised, and those who derived from him were aware of it by notice through him, yet they now contend that they are entitled to hold these mortgages, without any consideration whatever having passed from them. The plaintiffs are not benefited and the defendants are not injured. I think, therefore, as regards these lands, the decree pronounced in favour of the plaintiffs is right on that ground alone; but that there are others on which, if necessary, it could be sustained.

There remains the question whether there is any sound distinction between the land under the statute, and the land not under the statute. Although the knowledge of a professional person acting on behalf of both parties might possibly not affect his client with notice of fraud, he was bound to know all the facts which, as conveyancer, he ought to have inquired into, and those facts must, in my opinion, have led to a discovery of the fraud. The 50th section of the Transfer of Land Statute commences with the words: "Except in the case of fraud," and as that section is to a great extent restrictive of the rights of persons at law and in equity, it should, I think, be construed strictly, and the exception liberally; the word "fraud" there means fraud on the part of either party, and not necessarily of both; the section was never intended, in my opinion, to apply to such a case as the present. The object of the Legislature was to facilitate as much as possible the transfer of land. The registered proprietor of [*73] land is to be assumed to have an indefeasable title, and the person who purchases from him is not bound to institute inquiries, which otherwise would have been obligatory upon him in the case of an ordinary conveyance; but it was never intended that where fraud was committed by the purchaser himself he should be protected.

I do not know what the policy of the statute is, except so far as can be legitimately concluded from the statute itself, and judging from it, I do not think there has been any intention manifested that professional persons were not to be employed either on one side or the other, and that all malpractices on the part of the purchaser were to be sheltered. The section applies to a registered vendor, not an intending registered purchaser. I can draw no sound distinction between the two classes of land. I think, therefore, that the appeal by the defendants should be dismissed, and that by the plaintiffs allowed.

MR. JUSTICE STEPHEN :—

The primary Judge pronounced his decree as to the land brought under the statute with some doubt. We have had the very great advantage of reading His Honour's judgment, and of a second argument ; and I do not think there really is much doubt about this case. As to the transfers of the mortgages, the defendants had no contracting mind in the matter, and must adopt the contracting mind of their agent, and that was tainted throughout with fraud. It is not a case of two innocent persons. Before the transfers were secretly prepared by Murphy, the defendants had no position at all. The plaintiffs were in the ordinary position of persons whose money had been advanced upon these investments ; the defendants were perfect strangers to them. The transfers were effected by Murphy, and might have been undone the next day. The defendants had nothing to do with it, unless they adopted the act of Murphy as their agent, which, as pointed out by Mr. Justice Molesworth, adopts his fraudulent intention.

However, the ground on which I should prefer to put it would be the simple ground of failure of consideration. The transfer purports to be in consideration of £2,000 paid at the time, but nothing was paid at the time. The Firebrace trustees gave nothing. [*74.] They were not bound, down to the time of this suit, or even now, to accept the £2,000 investment made in this

extraordinary way by Murphy for them, as in discharge of one shilling of his debt.

Then His Honour felt a difficulty as to the Transfer of Land Statute. The primary intention of the Act was to facilitate the transfer of property. It was never intended to facilitate the acquiring or holding of property under fraudulent or improper circumstances. If a man has acquired property fraudulently, he may be able to transfer it to a purchaser more easily than under the old law, but if you can stop the property whilst it is in the man who is affected by fraud, you can take it away from him by the decree of the Court. The defendants do not come within the words of the 50th section. They are not persons "contracting or dealing with or taking or proposing to take a transfer from the proprietor," unless they adopt the acts of Murphy with all his fraud.

The case of Raleigh v. Glover[31] is an authority for the plaintiffs, and establishes the proposition that the doctrine of resulting trusts, arising from the fact that no consideration was paid, may be applied to land held under the Transfer of Land Statute. I see no difficulty in extending the relief to the land under the Act.

Solicitors for the plaintiffs :—Blake & Riggall.

Solicitor for the defendants :—Lynch.

IN CHAMBERS.] 17 V. L. R.82 (1891).

IN RE "TRANSFER OF LAND ACT, 1890,"

EX PARTE CLARK.

"Transfer of Land Act, 1890, ss. 145, 209—Mandamus on Registrar of Titles to compel registration.

The applicant was the unregistered transferee of leasehold land. The Registrar of Titles refused to register the transfer of such land on the ground that he was made a party to an action

[31] 3 W. W. & a'B. Eq. 163.

brought by a third party with respect to the land, on an application made by the applicant for mandamus to compel the registrar to register the transfer.

Held, that the ground alleged by the registrar was not sufficient to justify him in refusing to register the transfer.

Rule nisi for mandamus.

Application calling on Registrar of Titles and one Camp to show cause why a writ of mandamus should not issue directing the Registrar of Titles to register a transfer by one Bickley to the applicant. The applicant Clark was transferee of a mallee lease of land from one Bickley. The transfer was on 12th September, 1890, lodged at the office of Titles for registration. On the 29th September Camp issued a writ against the said Bickley and the Registrar of Titles, claiming specific performance of an agreement for the sale to him of the aforesaid leasehold land. Prior to this, on the 13th March, 1890, Camp had lodged a caveat in respect of the said land, forbidding registration of any change of proprietorship or any dealing with his estate or interest. This caveat lapsed. The transferee, Clark, then applied to the registrar to have the land registered. The registrar refused to act, on the ground that he had been made a co-defendant in the action of Camp against Bickley. No order had been served under Sec. 145 of the Transfer of Land Act, 1890.

Sprigg, for the Registrar of Titles :—This is not a proper case for mandamus, but for a judgment summons. In Short on Mandamus, p. 232, it is stated :—"It is well settled that where there is a remedy equally convenient, beneficial and effectual, a mandamus will not be granted. This is not a rule of law, but a rule regulating the discretion of the Court in granting writs of mandamus." [*83] He cited Ex parte Paterson ;[1] R. v. Mayor of Collingwood,[2] and Sec. 209 of the Transfer of Land Act, 1890.

Hayes, to move rule absolute :—This case turns on Sec. 145 of the Act. In this case the caveat has lapsed. Clark is in no better position after the decis-

[1] 4 A. J. R. 26 & 110.
[2] 2 V. L. R. (L.) 46.

ion of an action so long as the registrar blocks the way and refuses to do anything.

Neighbour, for Camp :—The person who should enforce registration is the registered proprietor. Mandamus is an extraordinary remedy, applicable only when there is no other remedy. Clark can bring an action against the vendor claiming specific performance.

[a'Beckett, J.—Is he to be driven to that remedy?]

The vendor is the person to compel the registration. Taylor v. Land Mortgage Bank of Victoria.[3]

a'Beckett, J.—This case comes before me on an application to make absolute a rule nisi for a mandamus. The question is, Can I issue a writ of mandamus to compel the Registrar of Titles to register this transfer ? In the course of the argument the facts of the case have appeared, and I take them to be these shortly: A transfer is lodged for registration by the present proprietor of the land, Clark. There is no caveat in operation to prevent its registration. The registrar refuses to register on the ground that he is made a co-defendant in an action brought against the former proprietor of the land in respect of the land, and accordingly the registrar refuses to do anything until the determination of this action. The present applicant is no party to that action, so the effect of the registrar's refusal to act is this, that the plaintiff in the action has the benefit of a continuous caveat till the end of the action, or of the result of an injunction in proceedings in which Clark cannot intervene, and which he is powerless to prevent. The applicant has complied with all the requirements of the Act, but the registrar will not move, simply on the ground that he is made a party to an action. I do not think that that is a sufficient ground to justify the registrar's action, or rather inaction, in this case. [*84] The Act makes full provision for the protection of the rights of parties equitably interested ; in many cases this is obtained by means of an injunction, which is granted

3 12 V. L. R., 748.

only in the presence of the persons interested in the remedy, and without any prejudice to rights of parties who may be unheard. But in this case the registrar excludes all consideration of the transferee's rights, and injury may be inflicted on the transferee's rights which may be serious. This arises from the delay on the part of the registrar, and the only remedy which will assist the present applicant is a remedy against the registrar.

It was further said that it was properly the duty of the vendor to have the necessary steps taken to have the transfer registered. I do not now require to examine the case cited in support of that proposition, or to inquire into the extent of the duty which is imposed on the vendor. But because there is a duty on the vendor it does not follow that the transferee cannot help himself if he chooses to do so by moving in the matter himself instead of exercising his right through his transferor. I think the transferee can help himself if he choose to do so. The transferee has no direct remedy but this, and therefore I think he is entitled to a writ of mandamus. It is true that under the law as it formerly existed, with respect to caveat, the transferee was not the person to move, and that has been remedied by subsequent enactment. But this case is not one of caveat at all ; the registrar does not pretend that it is. The caveat has lapsed. The registrar rests his refusal to register simply on the ground that he is made a party to an action. I think he has still a duty cast upon him to register this transfer notwithstanding the fact that he is defendant in the action. The rule will therefore be made absolute with costs against the registrar.

With regard to Camp, he no doubt highly approves of the registrar's action. It provides him with an agreeable and safe mode of getting what he desires, and of preventing any assertion of rights by the applicant without any responsibility on his own part, He is in the enviable position of enjoying his full rights as against the applicant, without any obligation to make good any loss which may ensue to the applicant. At the same time, although he may approve, Camp is not responsible

for the mistaken action [*85] of the registrar. He did not cause it and therefore the rule is made absolute with costs against the registrar only.

Rule absolute.

Solicitors for applicant:—Cuthbert, Hamilton, Wynne & Co.

Solicitors for Camp:—Davies, Price & Wighton.

Solicitor for Registrar:—Guinness, Crown Solicitor.

VICTORA, 1880—CORAM—MOLESWORTH, J.]

[6 V. L. R. (E.) 186.

THE COLONIAL BANK OF AUSTRALASIA v. PIE.

"Transfer of Land Statute" (No. 301), ss. 48-50—Fraud—Notice—Practice—Supreme Court Rules, c. 6, r. 28—Reference to Master to inquire and report on facts—Report—Stating conclusions and evidence fully—Hearing of exceptions and further directions together—Death of party after judgment reserved—Pronouncing decree—Right of appeal—Commencement of time.

Sec. 50 of the "Transfer of Land Statute" (No. 301), protects from constructive notice, but not from actual notice, of fraud.

Where a decree directed the Master "to inquire and report the circumstances" of a sale, and whether defendant had notice of transactions, etc., and the Master in his report set out the evidence taken and his conclusions thereon. Upon exceptions—Held, that he was right in stating his conclusions; but should not have set out the evidence, except by reference.

Where a suit comes on, on exceptions and further directions together, the exceptions should be disposed of, before the further directions are considered.

Where a party dies after judgment reserved, the Court may proceed to give judgment without any revivor being necessary. In such case, the right of repeal runs from the date of pronouncing the decree, and the Court will not antedate it. Semble, that in such a case the time for appeal does not begin to run until there is a person entitled to appeal.

Exceptions and further directions.

This suit is reported upon the hearing 6 V. L. R. (E.) 38. [The judgment was as follows:—(p. 42.)

MR. JUSTICE MOLESWORTH:—

The defendant Mr. Pie was seized of land, corner of Victoria Street and Stawell street, under the old tenure, and of land adjoining, held under the Act No. 301, and

of seven other pieces of land of that tenure. An action was commenced against him by the plaintiff, the Colonial Bank of Australasia, September, 1878, which he resisted, but judgment was recovered against him July, 1879, for more than £4,000, and a fieri facias was issued, which was nearly unproductive and so returned. On 25th Feb., 1879, Pie mortgaged the first-mentioned two pieces of land to a building society for £1,000. The plaintiff does not impugn that mortgage, seeks only the equity of redemption. On the 10th March, he assigned the equity of redemption to the defendant, Mr. Cornfoot, a cousin of his wife, Mrs. Mary Cornfoot Pie, as a trustee for her. Cornfoot never accepted this conveyance, and disclaims. He was made a party in reference to it only. About the same time (27th February, 1879) all the other pieces of land under the Act 301, were transferable to her by instruments falsely reciting that £2,000 was paid by her as a consideration, they being really voluntarily, and she obtained certificates of title for them. I think it clear, upon the evidence, that these conveyances to or in trust for Mrs. Pie were designed to defeat the action then pending by the plaintiff, and fraudulent against it. The bill was sealed 19th August, 1879, seeking declaration to the above effect, and to restrain transfers from the defendant being acted upon at the Transfer of Title office. But the defendants, Cornfoot, Pie and his wife, by answers, alleged that Cornfoot purchased from Mrs. Pie four of the above seven pieces of land held under the Act No. 301, for the sum of £1,100, and on 9th August, she transferred them to him, and that he became the registered proprietor of them. The plaintiff did not amend its bill to impugn this transaction, and evidence was taken before me throwing some light upon it.

I think Cornfoot knew enough of the affairs of the Pies to be fixed with constructive notice of the fraud by which Mrs. Pie had acquired this property, to have his title postponed to plaintiff if the property were held by the old tenure ; and with reference to [*43] the Act No. 301, Secs. 49 and 50, that there is much reason for saying that his motives for acquiring the property were not those of

an ordinary purchaser, but a wish to screen the property for the Pies from the plaintiff. According to the defendants' evidence, the contract of sale was for £1,100. (There is some evidence this was an undervalue.) This was payable £475 cash, the rest, bills at three, six and twelve months ; that the cash was paid 29th August ; that the bills were at the same time handed to Mrs. Pie and not negotiated, but they, remaining in her hands, were taken up and paid long before they were respectively due.

Cornfoot appears not to have had money for this purchase, but to have raised the £475 cash and the moneys paid for the bills, by depositing the certificates of title, which makes it hard to say what should be the form of the decree against him ; in regard to which I mean to direct inquiry. The plaintiff has been paid, and is being paid, part of its demand against the defendant Pie, by other persons liable with him, as to which I shall direct an inquiry.

The case has been argued on behalf of the defendants, in regard to judgment creditors not having a lien upon land. The true aspect of this suit is that it seeks redress for an execution creditor frustrated by fraudulent conveyance of property, the same as if the property were chattels personal. I have been referred to various cases as to the duty of a purchaser informed of a claim on property, before payment of part of the purchase money, to reserve that part, and not pay it to the seller, which may bear upon this case hereafter. I shall declare that the conveyance of 10th March, 1879, in bill mentioned from the defendant William Pie to the defendant David Cornfoot, and also the transfer of allotment 10, Sec. 23, in the bill mentioned, were fraudulent and void as against the plaintiff's right to execution of the judgment of 8th July, 1879, in bill mentioned, and costs of this suit. Declare also that the transfers of the 27th day of February, 1879, in bill mentioned, by the defendant William Pie to the defendant Mary Cornfoot Pie, were fraudulent and void as against the plaintiff, so far as may be necessary to satisfy his said judgment debt, interest and costs. Refer it to the Master to inquire and

report the circumstances of the sale mentioned in the answer of the said defendant, David Cornfoot, paragraph 21, and the value of the lands comprised therein, and whether and how far the defendant David Cornfoot then had notice of the nature and motives of the transactions between the defendants William Pie and Mary Cornfoot Pie, or when he first had notice thereof, and also of the time and manner of the payment of the purchase money of [*44] the lands bought by the said David Cornfoot, and of the bills forming part of the consideration for the same. Also to inquire and report whether the defendants Mary Cornfoot Pie and David Cornfoot have given any lien or encumbrance upon the lands in the 6th paragraph of the bill mentioned by deposit of certificates of title or otherwise. Refer it also to the Master to inquire and report whether the plaintiff has been paid any part of its demands against the defendant William Pie, by other persons liable thereto. Order that in the meantime, the defendants Mary Cornfoot Pie and David Cornfoot be restrained from selling or encumbering any of the lands comprised in the transfer of 27th February, 1879, in bill mentioned, and the defendant Richard Gibbs, as Registrar of Titles, be restrained from registering any transfers or other dealings with the said lands by the said Mary Cornfoot Pie and David Cornfoot ; an injunction to issue for the above purposes if necessary. Reserve further directions and costs. Liberty to apply.]

The Master took evidence and made his report. The defendant [*187] Cornfoot filed exceptions to the report. The suit now came on, on the exceptions and on further directions.

Mr. Billing, Q.C., Mr. Fullerton and Mr. Topp, for the defendant Cornfoot :—As the arguments on the exceptions and on the further directions will be identical, they should be taken together, and the hearing on further directions proceeded with, the plaintiff's counsel beginning.

Mr. Holroyd, Q.C., and Mr. De Verdon, for the plaintiff objected.

MR. JUSTICE MOLESWORTH :—

The exceptions, usually, are first disposed of.

The exceptions were filed in order to review the Master's report, and his finding upon the question referred to him by the decree, as to whether Cornfoot had notice or not of the dealings of the Pies. The exceptions were, generally, that by the reference in the decree the Master was not at liberty to draw conclusions, but only to take and report the evidence ; that the Master should not have set out the evidence or reasons for his findings; that his findings were not justified by the evidence ; and that he rejected evidence offered on behalf of Cornfoot which he should have received.

Mr. Billing, Q.C., Mr. Fullerton, and Mr. Topp, in support of the exceptions :—The evidence does not support the findings, as it amounts only to vague reports and the like : Sugden V. & P. 755. The evidence should not have been set out : Sup. Ct. Rules, cap. VI. r. 28. [Counsel stated what the rejected evidence amounted to.]

Mr. Holroyd, Q.C., and Mr. De Verdon for the plaintiff.

MR. JUSTICE MOLESWORTH :—

As to the exception that the Master was not to draw conclusions, I think under the decree he was entitled to do so, and was right. [*188] The other objection does not show what particular evidence was rejected, and it is difficult to deal with the objection. Having heard what the rejected evidence would have been, it appears that Cornfoot has had the benefit of it really. I agree with the Master in the conclusions he has drawn. As to the objection under Sup. Ct. Rules, cap. VI. r. 28, I delivered a judgment in Slack v. Atkinson,[1] in which I considered that such was a proper matter for exception. The Master here does set out the evidence ; but as I overrule all the other material exceptions, I will not make any order as to this technical one, but generally overrule the exceptions, and say nothing about costs until finally disposing of the case.

[1] Sup. Ct. Vic. 24th June, 1878.

The hearing on further directions was then proceeded with. There were nine pieces of land sought to be affected by this suit; one mortgaged under the old law to the Second South Melbourne Building and Investment Society, the equity of redemption in which the plaintiff sought to affect. One other piece had been sold. Of the other seven, four had been transferred to Cornfoot, which he mortgaged by deposit with Thomas Hood and Thomas Upton, and of the other three one was mortgaged to the building society, one unencumbered, and the third subject to a charge of £15 to William Kirkus. Kirkus.

All these lands but the first mentioned were held under the "Transfer of Land Statute."

Mr. Holroyd, Q.C., and Mr. De Verdon for the plaintiff:—As Hood and Upton and the building society are not parties to this suit, no decree affecting their rights is asked for. But treating Cornfoot as a purchaser with notice of the fraud of the Pies, the plaintiff asks for an order for the sale of the lands by the Master, either free and discharged from, or subject to, the incumbrances affecting the same, and the proceeds to be applied so far as they will extend in payment of what is due to the bank for principal, interest, and costs of suit against the Pies, over and above what the Master finds the bank has received under the deed of 1878; costs also against Cornfoot; also that the Pies and Cornfoot should concur in the transfers to the purchasers.

Mr. Billing, Q.C., Mr. Fullerton, and Mr. Topp, for the defendant Cornfoot:—Cornfoot was not a purchaser with notice, affected by the fraud of the Pies, apart from the "Transfer of Land Statute." Mere suspicion is not sufficient: Sugden V. & c. 779; nor is inadequacy of consideration, ibid 286. Under the statute, constructive notice is not sufficient, Cullen v. Thompson;[2] there must be an actual notice amounting to actual fraud. There is none such here: Le Neve v. Le Neve.[3] But under the statute, notice actual or constructive is of no avail; the

[2] 5 V. R. (E.) 149.

[3] 2 W. & T. L. C. 49.

circumstances must show actual fraud between the vendor and vendee. Fraud between the Pies and some other person is not sufficient under Sec. 49. "The Transfer of Land Statute" is an Act to give title by registration: Registrar of Titles v. Paterson,[4] and the policy of the Act, giving title by priority, should not be eaten away: Hine v. Dodd,[5] Jollond v. Stainbridge,[6] Wyatt v. Barwell.[1] After Cornfoot's answer, the bill should have been amended, charging fraud; as, however, no fraud is alleged by it, relief under Sec. 49 cannot be granted. The bank did not avail itself of Sec. 106 to obtain the benefit of its judgment by serving the registrar within three months. As to the position of chattels personal under the Registration Act, see Morewood v. The South Yorkshire Ry. Co,[8] Darvill v. Terry.[9] Reference was also made to Wood v. Dixie,[10] Holbird v. Anderson, [11] Pickstock v. Lyster,[12] Robertson v. Keith,[13] The mortgagees ought to have been made parties: Seton on Decrees 1182. Copis v. Middleton.[14] No costs should be given against Cornfoot, he was made a party to the suit only as a trustee.

Mr. Holroyd in reply:—Actual notice of improper motives actuating the Pies has been found by the Master, and that is sufficient: Maddison v. [*190] McCarthy,[15] Cadogan v. Kennett.[16] After suit and notice to him, Cornfoot encumbered the property; he cannot therefore, object that his encumbrances are not parties. Prima facie he should release the land from the encum-

[4] 2 App. Cas. 117.
[5] 2 Atk. 275.
[6] 3 Vesey, 478.
[7] 19 Vesey, 435.
[8] 28 L. J. Ex. 114.
[9] 30 L. J. Ex. 355.
[10] 7 Q. B. 892.
[11] 5 T. R. 235.
[12] 3 M. & S. 371.
[13] 1 V. R. (E.) 14.
[14] 2 Madd. 423.
[15] 2 W. W. & a'B. (E.) 151.
[16] 2 Cowp. 434.

brances, but if he cannot, an order, as asked for, should be granted.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

This case stands for judgment, but I observe by this morning's paper that the principal defendant Cornfoot has died, and I am not sure as to the practice where a death occurs between the conclusion of the argument and reservation of judgment, and the actual pronouncing of the judgment. I should think that there must be some precedents in Lord Eldon's time. I will postpone delivery of judgment until I have further considered the practice and whether some steps should not be taken to revive the proceedings against the representatives of the deceased. I shall be glad to hear what view the parties take of this.

Upon this day a motion was made, on behalf of the plaintiff, that judgment should be pronounced and the order made thereby be antedated to the day of the close of the arguments, and that the form of the order might be spoken to.

An affidavit of the facts was filed, whereby it appeared that Cornfoot had died on the 25th October. His solicitor was served with notice of this motion.

Mr. Holroyd, Q.C., and Mr. De Verdon, for the plaintiff :—After the death of the defendant the Court can give judgment and the decree should be dated as of the day of the argument, when judgment was reserved : Davies v. Davies ;[17] Collinson v. Lyster ;[18] Turner v. The London & South Western Ry Co.[19] A clause may be inserted in the decree reserving the right of the representatives of the defendant to appeal under 19 Vic. No. 13, s. 5.

[*191] Mr. Fullerton and Mr. Topp, for Mr. Jennings, the solicitor of the deceased :—No probate having been

[17] 9 Ves. 461.

[18] 20 Beav. 355.

[19] L. R. 17 Eq. 565.

taken out by the executors or other representatives appointed, the decree should not be antedated, for the appeal time runs from the pronouncing of the decree: Hodgkinson v. Courtney,[20] Supreme Court Rules, Cap. V. rr. 14, 17. It is not according to the practice to speak to the form of the order: Supreme Court Rules, Cap. VI. r. 21; McKean v. Francis,[21] Porteous v. Oddie.[22] [Mr. Justice Molesworth :—As to the appeal, there must be some construction put on the sections whereby parties will not be deprived of an appeal under these circumstances. If there be no person who could appeal, the right and time would not arise or begin to run until there was a person entitled to appeal.]

Mr. Holroyd in reply.

MR. JUSTICE MOLESWORTH :—

There is now no one representing the deceased defendant, and although his solicitor was served and has appeared by counsel, I must treat this as an ex parte application. As to entering up the decree nunc pro tunc I do not see any necessity for it, according to the form of decrees at present in use in this Court where judgment has been reserved. There is no use in introducing falsities into the decree; it should state the truths of the events. I will look into the authorities. I am not at present aware whether the English form of decree differs from ours, or whether there is anything showing whether the parties are alive or dead at the time of the decree. [Mr. Holroyd :—The forms in England and here are identical, except that we do not state that the cause has been set down for judgment.] As at present advised, I am not inclined to depart from the ordinary form. I will announce when I intend to make the decree, and shall be glad to hear counsel for the parties upon matters limited to mere oversights, not as to matters necessarily the result of the decree. I will not enter into any matters or questions not raised or asked for at the hearing.

20 1 V. L. T. 146.

21 5 A. J. R. 159.

22 1 V. L. R. (E.) 148.

[*192] The appeal is saved, as being from the time of my pronouncing the decree.

I will reserve my decision on all matters. Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

In this case I have to refer to the report 6 V. L. R., Eq. 38, for facts up to the reference to the Master. The Master made a report, dated 8th September, by which he found that on the 16th July, 1879, the sale to the defendant, Mr. Cornfoot, was first proposed to him by the defendant, Mrs. Mary Cornfoot Pie ; that Cornfoot then had heard of the plaintiff's action and judgment; that the property proposed to be sold had belonged to the defendant, William Pie, and had been transferred by him to Mary Cornfoot Pie, and had been made over to her voluntarily, and that he had no doubt that there was some motive in the conveyance of William Pie to Mary Cornfoot Pie to place his property out of the reach of the plaintiff, and suspected that motive ; that the defendant David Cornfoot, agreed verbally to purchase the property on the 3rd or 4th August, 1879, and the transfers of the land from her to him were executed, but no money was then paid, and the defendant Mary Cornfoot Pie gave the transfers to her solicitor, who acted also as solicitor for Cornfoot, with instructions to hold them until she was paid the purchase money ; that on 20th August, 1879, Cornfoot was served with the bill in this suit, that on 29th August, 1879, Cornfoot gave Mary Cornfoot Pie £475 in cash and three acceptances for the balance of the purchase money ; that the bill in this suit was then mentioned ; that the acceptances were paid before they fell due. The Master also found that, from the above circumstances, Cornfoot had, at the time of the sale before any purchase money was paid by him, notice of the nature and motives of the transaction between William Pie and Mary Cornfoot Pie.

The defendant Cornfoot took exceptions to this report, which I overruled. I had expressed a suspicion that Cornfoot's motives for the purchase were to assist the Pies in completing the fraud which they had commenced. But

this is not confirmed by the report, so that I should deal with Cornfoot as having purchased land which he wanted under an impression that he would get a good title.

[*193] The statute No. 301 presents difficulties of construction which I have felt in several cases, and feel here. By Sec. 50, "Except in the case of fraud, no person contracting or dealing with, or taking, or proposing to take, a transfer from the proprietor of any registered land shall be required, or in any manner concerned, to inquire or ascertain the circumstances under or the consideration for which such proprietor thereof was registered." This seems to me to protect from all constructive notices, but not from such actual notices of the fraud of the Pies against the plaintiff as Cornfoot here had at the time of the sale, and accepting the transfers, and more distinctly by the actual service of the bill, and his leisurely reading it before the completion of the transaction and payment of the purchase money. The bill was served on Cornfoot, not in reference to his contemplated dealing, but its words were distinct statements of true facts. I have nothing to do here with the latter part of Sec. 50, which regards trusts or unregistered interests, which do not, I think, include such interest as the plaintiff here had. I think that Cornfoot was in a position to have broken off with Mrs. Pie without completing or paying purchase money, even assuming that there was what would otherwise be a contract binding him on the execution of the transfers.

There is an odd provision in Sec. 48 as to suits for specific performance, which, as I read it, would have disabled Cornfoot from resisting a suit for specific performance on the ground of notice of plaintiff's claim received after the execution of the transfers, but the notice here was before. That section strengthens my view of Sec. 50. Cornfoot would be entitled to costs so far as the suit was against him as a trustee. He acted, as to completing his purchase, under the advice of his solicitor, upon the construction of an Act—wrong in my opinion, which is by no means decided. I shall not

make a decree for costs against Cornfoot personally. The defendant Cornfoot has died since the argument of this case, which does not prevent my making this decree, and I see no reason to depart from the ordinary form of making up decrees where there is an interval between argument and judgment. If there is any inconvenience as to revivor, [*194] appeals, or enforcement from the date of the decree appearing after Cornfoot's death, I shall endeavor to obviate it.

Declare that the plaintiff is entitled to be paid its principal debt (judgment recovered 8th July, 1879), deducting thereout the sum of £1,658 2s. 6d. mentioned in the Master's report, and such other sum as may be paid by the other parties liable for the said judgment, with interest at 8 per cent. and its costs of this suit, including the costs of exceptions to the Master's report out of the lands in bill mentioned—this is to say, the land in the 6th paragraph of the bill mentioned, held under the old law; and the first allotment therein mentioned, held under the Act No. 301, subject to the mortgage of the 25th day of February, 1879, in bill mentioned, and the allotments under the Act No. 301 in the said paragraph, secondly, thirdly, fifthly, sixthly, seventhly, and eighthly mentioned; so far as regards the interests of the defendants, William Pie, Mary Cornfoot Pie, and David Cornfoot therein, and declare that the plaintiff is entitled to have the said lands sold for payment of its said debt; and decree that the Master may proceed to sell the said lands respectively, or so much thereof respectively as may be necessary for the purpose aforesaid, and that the said defendants respectively shall join in conveyances to the purchasers thereof respectively and the purchase money be brought in. Direct that the said lands may, at the option of the plaintiff, be sold either subject to or discharged from the rights of the Second South Melbourne Building & Investment Society, Thomas Hood, Thomas Upton, and William Kirkus respectively, so discharged in case the said several parties shall consent to join in conveyances, and be paid out of the purchase money, but otherwise subject thereto without prejudice to the right of the plaintiff to proceed, as it may be advised to impugn the claims of the said Thomas Hood, Thomas Upton and William Kirkus respectively. Refer it to the Master to tax the said costs. Continue the orders in the said decree against selling and encumbering the said lands and registering transfer thereof. Reserve liberty to apply.

Solicitors for the plaintiff:—Moule & Seddon.

Solicitor for the defendant Cornfoot:—H. N. Jennings.

1877.] [3 V. L. R. (E.) 111.

ATTORNEY-GENERAL v. HOGGAN.

Information—Escheat—"Statute of Limitations" (No. 213), Part II.—"Transfer of Land Statute" (No. 301), s. 24—Injunction—Jurisdiction.

There is jurisdiction in Equity to entertain an information filed by the Attorney-General for a declaration of the title of the Crown to an escheat, and for an injunction against any dealing with the land by the Registrar of Titles; although the information shows a legal title in the Crown and alleges no special ground of equitable jurisdiction.

The Statute of Limitations (No. 213), Part II., does not affect the Crown.

Information by the Attorney-General against James Hoggan and Richard Gibbs (Registrar of Titles) seeking a declaration of title by escheat to certain land in the city of Melbourne, and an injunction to stay the bringing of it under the Transfer of Land Statute, and the registering of the defendant Hoggan as proprietor.

[*112] By Crown grant of the 29th April, 1847, allotment 8 of Sec. 25, of the city of Melbourne, was granted to Douglas Thomas Kilburn, in fee. By conveyance of the 26th October, 1848, Kilburn conveyed to Margaret Ellen Kilburn, his natural daughter, in fee the land now in question, being part of such original Crown allotment. Margaret Ellen Kilburn died in the year 1860, without ever having been married.

The defendant Hoggan was now in possession of the land, having originally entered as tenant to Margaret. He applied to have the land brought under the operation of the Transfer of Land Statute; and a caveat was lodged on behalf of the Crown, and this suit instituted. By his answer the defendant Hoggan claimed a title by possession under the Statute of Limitations (No. 213), Part II.; and submitted that there was no jurisdiction in equity to sustain the suit.

The defendant Gibbs did not appear.

Mr. Webb and Mr. Worthington for the Crown :—

There is no dispute as to the facts. Two defences are raised by the answer : (1) The Statute of Limitations ; (2) Want of jurisdiction. As to the first, the statute does not run against the Crown ; and as to the second, upon the death of Margaret Ellen Kilburn, the land escheated to the Crown, per defectum sanguinis, and the fee simple was thereupon immediately vested in the Crown; Chit. Prerog. pp. 226, 227, Watkins on Conveyancing, 188, Wright's Tenures, 115, 2 Bl. Com (Chitty), 72. To obtain possession of the land the Attorney-General has taken the proper course of proceeding, for the Queen may sue in any Court without reference to the question of jurisdiction : Danl. Chy. Pr., 5th edition, pp. 4, 5 ; and the information for intrusion may be filed in this Court, notwithstanding the omission to state therein matter of equitable jurisdiction : Atty.-Gen. to the Pr. of Wales v. St. Aubyn.[1] Further, to restrain the registrar from dealing with the land, two courses are open by Sec. 24 of the "Transfer of Land Statute" (No. 301), one, by notice merely, which expiring in a month is ineffectual ; and the other and effectual method, by order or injunction, as pointed out in Hodgson v. Hunter,[2] and Geraghty v. Russell.[3]

Mr. a'Beckett for the defendant Hoggan :—This Court has no jurisdiction. If this were a case between subject and subject, it would not be sustainable. Hodgson v. Hunter,[4] followed by a late case of Ex parte Gunn, in re the Transfer of Land Statute,[5] in which the Court in banco made an order according to the suggestion in Hodgson v. Hunter, and exercised a special jurisdiction. Being an information by the Attorney-General, it is sought to be supported by the dictum in Danl's Chy. Pr. cited, which is opposed to the remarks of the Lord Chan-

[1] Wightw. 167.
[2] 3 A. J. R. 13.
[3] 5 A. J. R. 89.
[4] 3 A. J. R. 13.
[5] 3 V. L. R. L. 36.

cellor in Mayor of London v. The Attorney-Gen.,[6] and is not supported by the case of The Att.-Gen. to the Pr. of Wales v. St. Aubyn.[7]

This information cannot be supported as by way of a writ of intrusion, because the Crown has never been possessed of the land, and the defendant came in rightfully. Further, the information asks for no relief in that aspect, i.e., that the Crown may be put into possession and the defendant dispossessed, but asks merely for an injunction.

The "Crown Remedies and Liabilities Statute 1865" (No. 241), Secs. 3 and 14, provides the proper remedy in this case, by ejectment; and this proceeding by information is inconvenient, as it affords no opportunity of going into evidence upon disputed facts.

Mr. Webb in reply :—An ejectment would not be proper for two reasons: (1) No injunction can be obtained in an action of ejectment, and (2) The issue of "escheat" could not be tried in such an action, and until the fact of the escheat is determined the Act No. 241 can not apply. A writ of intrusion would lie upon the very facts of this case, a tenant holding over: 3 Bl. Comm. (Chitty), 261; Chitty's Prerog., 332. The case of Ex parte Gunn,[5] did not decide that the Court in its equity jurisdiction could not grant an injunction, but only that an order at common law was an alternative remedy.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

This is an information by the Attorney-General against Mr. Hoggan and Mr. Gibbs, the Registrar of Titles. It states that a person who died without heirs, more than fifteen years ago, was seized of a piece of land in Melbourne, and therefore that the Crown is entitled to escheat. The case has been proved.

The Statute of Limitations (No. 213), Part II., does not affect the Crown.

[6] 1 H. L. C. 440, at pp. 467 & 468.

[7] Wightw. at pp. 215 & 231.

The point upon which I have felt difficulty is, as to the right of the Crown to sue in a Court of equity, having a legal title. There are a number of authorities, dicta, as to the right of the Crown to sue in any Court. The authorities are collected in 1 Dan. Ch. Pr. 4 ; Chitty's Prerog., 244 ; 11 Rep., 75 ; Burgess v. Wheate,[8] Attorney-General v. Galway,[9] Attorney-General v. The Corporation of London ;[10] but the jurisdiction there might be sustained without regard to Crown prerogative, and the dictum is not repeated in The Mayor of London v. The Attorney-General.[11] In R. v. Arundel,[12] the Crown had a decree, and the circumstances of difficulty in tracing deeds would not, I think, have sustained the jurisdiction of Chancery between subject and subject. In The Att.-Gen. to the Pr. of Wales. v. St. Aubyn,[13] there was a conflict of opinion among the Judges. It was decided on the ground of its being a case for equitable jurisdiction, without regarding Crown prerogative. The balance of authority appears to be for the jurisdiction. If there was any doubt of the facts, I would direct an issue.

Declare that the piece of land in the bill mentioned is escheated to, and is now vested in Her Majesty the Queen, and that the defendant James Hoggan has no title thereto as against Her Majesty. Order that the defendants James Hoggan and Richard Gibbs respectively, be perpetually restrained, the said James Hoggan from proceeding with the application in the bill mentioned, or any such application for bringing the said piece of land under the operation of the Transfer of Land Statute ; and the defendant Richard Gibbs from bringing the said piece of land under the operation of the said statute, or registering any certificate of title in the name of the said James Hoggan. Direct that writs of injunction issue if necessary.

Solicitor for the Attorney-General :—Gurner, Crown Solicitor.

Solicitor for the defendant Hoggan :—O'Halloran.

[8] 1 W. Bl. 131.

[9] 1 Molloy, 95.

[10] 8 Beav. 270.

[11] 1 H. L. C. 440.

[12] Hob. 109.

[13] Wightw. 167.

SUPREME COURT, VICTORIA, 1877.] [3 V. L. R. (L.) 199.

In re THE TRANSFER OF LAND STATUTE, *Ex parte* CUNINGHAM AND ANOTHER, *In re* McCARTHY.

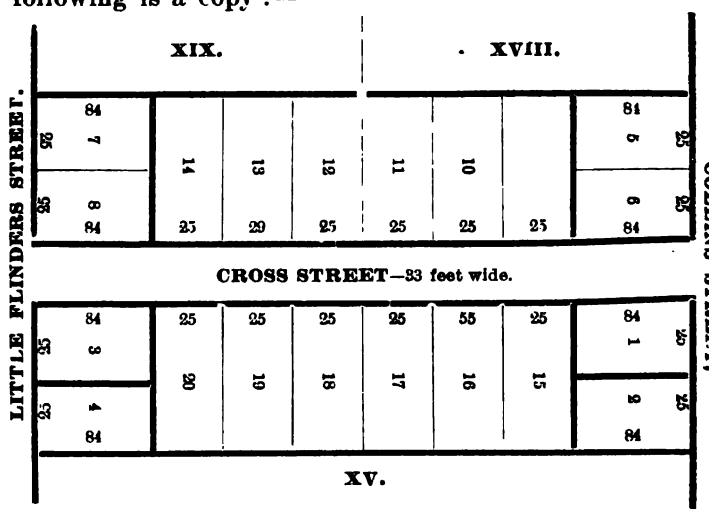
"Transfer of Land Statute" (No. 301), sec. 17—Registration—Easement—Incorporeal hereditament.

In bringing land under the "Transfer of Land Statute," an easement over land not under the Act cannot be registered.

Only such incorporeal hereditaments as are actual "estates" in the land, as contradistinguished from "easements," can be brought under the "Transfer of Land Statute," where the land itself has not been brought under the Act.

Order nisi obtained by Hastings Cuningham and J. K. Smyth, calling upon Mrs. Ellen McCarthy and the Registrar of Titles to show cause why the registrar should not be restrained from bringing certain land under the "Transfer of Land Statute."

The trustees of the Melbourne Gas Company were seized in fee of two adjoining Government allotments, numbered 16 and 17, in the city of Melbourne, each running through from Collins street to Little Flinders street, and having a frontage of 66ft. 6in. on each of those streets. They subdivided the two allotments into lots, according to a plan of subdivision of which the following is a copy :—



The boundary line between allotments 16 and 17, in fact, ran down the centre of Cross street [*200] but was not so shown upon the plan. These lots were put up for sale by auction in May, 1854, by reference to the plan. The late husband of the respondent, Mrs. McCarthy, purchased lots 3 and 4, and in his conveyance, dated 24th June, 1855, from the trustees of the Gas Company (therein described as such), the parcels were described as "All that piece or parcel of land situate, etc., being lots 3 and 4 on the plan of subdivision of allotment 16 of section 1, of said town of Melbourne, commencing at a point on the north side of Little Flinders street at the intersection of Cross street, 33 feet wide, with Little Flinders street aforesaid; thence in a line bearing northerly 84 feet along the east side of Cross street aforesaid; thence in a line, etc., together with the full and uninterrupted use and enjoyment at all times for ever hereafter of the several private roads or rights of way reserved out of the said portion over which the said (grantors) as such trustees as aforesaid have a disposing power, together with all houses, ways, etc., to the said land and hereditaments belonging or in any wise appertaining." McCarthy died in 1873 intestate. Mrs. Ellen McCarthy is his administratrix.

Messrs. Cuningham & Smyth purchased at various times others of the lots, and by a deed of the 1st April, 1865, they obtained a grant from the then trustees of the Gas Company, of all their right, title, and interest in the site of Cross street from Collins street for a depth of 179 feet 6 inches. In the same year they built a substantial store covering the whole frontage to Collins street, inclusive of and completely obstructing Cross street at that end, and still remain in possession. They are also in possession of lots 3 and 4 under a lease for a term of years from Mrs. McCarthy. Recently Mrs. McCarthy applied to the Registrar of Titles to bring under the Transfer of Land Statute lots 3 and 4, together with a right of way appurtenant over Cross street from Little Flinders street to Collins street. Cuningham & Smyth thereupon lodged a caveat in

respect of Cross street, in which they claimed an estate in fee simple in Cross street, except in so much thereof as runs for the distance of 84 feet north from Little Flinders street and forbade the bringing of the land so claimed, or of any right of way or easement thereover, under the operation of the statute. [*201] In support of this caveat they obtained the present order nisi. It did not appear on the affidavits that the soil of Cross street had been brought under the Act, and it was stated in argument that it had not been so, and that Cuningham & Smyth held the fee in it under the old law.

Billing, Webb and Box showed cause :—In order to ascertain the right of way given to McCarthy by his conveyance, it is a mere question of fact as to what private roads or rights-of-way were reserved by the vendors, and the plan of subdivision referred to in the conveyance is the best evidence of what was reserved, and of what was the "Cross street" described as the boundary of the land conveyed to McCarthy: Davis v. The Queen.[1] At the least, the reservation of the way is an estoppel upon the grantors before the conveyance of their right in the soil of Cross street to the present applicants, preventing them from denying the existence of Cross street for its whole length. This application virtually calls upon the Court to decide a question which is the subject of an action, in which an appeal to the Privy Council is pending.[2] The parcels of the conveyance to McCarthy describe the land conveyed as lots 3 and 4 on the plan of subdivision, bounded by Cross street, with the use of all roads, ways, etc., appurtenant thereto, so that we may refer to that plan to find what were these roads, to explain the latent ambiguity: per Pollock, C.B., in Glave v. Harding.[3] [Fellows, J.—Is it not a misnomer to speak of roads or ways appurtenant to these lots, while the whole was in the hands of the vendors? Is it more than the announcement of an intention?] But the grantors would

[1] 6 W. W. & a'B. Eq. at p. 123.

[2] Vide McCarthy v. Cuningham, 3 V. L. R. (L.) p. 59.

[3] 27 L. J. Ex. at p. 292.

be estopped from afterwards denying the existence of the road, or destroying it: Espley v. Wilkes,[4] Goddard on Easements (2nd edition), 214,[5] Peacock v. Penson.[6]

Section 17 of the Transfer of Land Statute (No. 301), allows "land" alienated from the Crown before 1862 to be brought under the Act, and "land" is, by Sec. 4, interpreted to include "hereditaments, corporeal or incorporeal," and "all easements [*202] and appurtenances appertaining to the land." This right of way is an incorporeal hereditament within the Act, and so may be registered. [Fellows, J.—Suppose a right of way to be acquired after the land had been brought under the Act, could you register it, and get a separate certificate for it?] There would be nothing unreasonable in that. The Act is intended to make title to incorporeal as well as corporeal hereditaments. The easement must be registered with the land to which it is appurtenant, and so upon every subsequent transfer, as each transfer is upon a separate folium, otherwise, persons looking at a subsequent transfer would not be informed of the easement. An easement appurtenant may be so registered, although an easement in gross cannot: Ex parte Johnson, In re Whyte.[7]

Higinbotham, Holroyd, a'Beckett and Williams in support of the order nisi:—The answering affidavits show that, from the nature of the levels at the Collins street end of Cross street it would have been impossible to use Cross street as a means of access to Collins street. [Fellows, J.—In this colony constant user would not confer a right.] Davis v. The Queen[8] and Espley v. Wilkes[9] go upon the question of abuttal upon the land sold. A grant of all ways appurtenant does not operate to create a way which is not shown to have existed previously; and while the whole land was in

[4] L. R. 7 Ex. at p. 303.
[5] 11 Beav. 355.
[6] 5 W. W. & a'B. L. 55.
[7] W. W. & a'B. Eq. 106.
[8] L. R. 7 Eq. 298.
[9] Ante. p. 59.

the same hands there would not be a way appurtenant to a part over any other part: Thomson v. Waterlow.[10] In Espley v. Wilkes[11] the way is one of necessity. Further, if any such right exists, it is at present in suspense, that is, non-existent for the time, being merged in the possession of the present applicants under their lease from the present respondent, as decided already by this Court on the demurrer in the action between the same parties:[12] Thomas v. Thomas.[13] Then if this alleged right of way be an easement not appurtenant, but in gross, it cannot be registered under the Act: Ex parte Johnson, In re Whyte.[14] The only case in which any right of way can be registered under Sec. 64 [*203] is where both dominant and servient tenements are under the Act. Here the servient tenement is not under the Act. The plan referred to in the conveyance to McCarthy was intended for the purpose of ascertaining the lots, not for defining the road. There is by the conveyance no estoppel upon the vendor, further than as to the existence of the road along the lots sold to the purchaser. [Fellows, J.—Is not this case like that of Nene Valley Drainage Commissioners v. Dunkley,[15] in which a plan was considered to be sufficiently incorporated ?] In that case the question arose upon the contract; no conveyance had yet been executed, and the plan was endorsed with a memorandum sufficient to incorporate it with the contract of sale. That case does not extend the principle of Espley v. Wilkes,[16] which shows that the intention is not to be changed so as to give more than the contract contemplated. The dictum of Pollock C.B., in Glave v. Harding,[17] relied on by the other side, is opposed to the current of authority, Fewster v. Turner.[18] All that the purchaser is entitled to is a way

[10] L. R. 6 Eq. 36.
[11] L. R. 7 Ex. 298.
[12] 3 V. L. R. (L.) 59.
[13] 2 Cr. M. & R. 34.
[14] 5 W. W. & a'B. L. 55.
[15] L. R. 4 Ch. D. 1.
[16] L. R. 7. Ex. 298.
[17] 27 L. J. (Ex.) 286.
[18] 11 L. J. (Ch.) 161; 6 Jpr. 144.

to the nearest highway, Randall v. Hall.[19] Supposing the whole road was reserved, such a reservation would not be final, it is, at the utmost, nothing more than an intention. A street does not mean a thoroughfare, Blyth v. Parlon.[20]

Cur. adv. vult.

STAWELL, C.J.—This was a motion for an order restraining the Registrar of Titles from bringing under the Transfer of Land Statute land, together with a right of way over certain other land called Cross street. The word "land," when used in the Act, is to include corporeal and incorporeal hereditaments, and, when used in any certificate of title, is to include all easements appertaining to it, or reputed to be part thereof or appurtenant thereto.

As regards the land called "Cross street," the caveator objects that a certificate of title ought not to be issued which will in any way affect that street, or the caveator's title to the soil of it [*204] free from all servitude as a right of way. He bases his objection on two grounds: first, that there is no right of way further north than 84 feet from Little Flinders street; and, secondly, that as the land called Cross street has not been brought under the Act, there is no power to subject it, by means of the Act, to this kind of servitude or incumbrance. Whether the road or right of way which is admitted by the caveator to exist as far as 84 feet north of Little Flinders street, extends beyond that point, so as to entitle the applicant for registration to use it as a means of access to Collins street, is the only point in dispute between the parties, for there is no objection whatever to the issue of a certificate in respect of the land at the south end of Cross street.

On the other hand, it was urged that, as in case of a "right of way of necessity," Cross street is only to be used as a means of access to the "nearest" public highway, that is Little Flinders street, and Randall v.

[19] 4 DeG. & S. 343.
[20] 2 Vic. R. Eq. 111; 2 A. J. R. 75.

Hall,[21] was relied upon in support of the view, for which perhaps it may be an authority. On the other hand, it was contended that a right of way had been granted along the whole length of Cross street, and that the grantee was consequently not limited to the use of that part which would give him access to Little Flinders street, but was entitled also to traverse it northward, and so gain access to Collins street.

Which of these two views is the correct one, it is at present unnecessary to determine, for in neither event is it allowable to place on the register or in the certificate of title, any easement over, upon, or affecting land which has not been brought under the Act. There is no mode of indicating an easement, and, so far as we can see, only one mode pointed out by the Act. Section 64 prescribes that when any easement is created over or upon or affecting any land under the operation of the Act, a memorial is to be entered upon the folium constituting the title to such land, or, in other words, a blot is to be made in the register on the title to the servient tenement. There is no provision for showing on the title of the dominant tenement any easement which may be appurtenant to it, though, as we have already seen, the use of the word "land" will carry with it any easement which its owner can be proved by evidence, [205] external to the register, to be entitled to enjoy in respect of his ownership of such land.

The Legislature having thus expressly provided a mode of indicating easements over land which has been brought under the Act, and having been silent as regards land which has not been brought under the Act, the Court cannot, without usurping the functions of the Legislature, apply to the latter the mode of procedure which had been prescribed only for the former, even if there had been, as in our opinion there is not, any reason for supposing that the Legislature would have done it had their attention been directed to the matter.

An order must therefore be made restraining the registrar from bringing the right of way under the Act.

[21] DeG. & S. 343.

It must not be supposed that this decision lays down a rule that all incorporeal hereditaments are incapable of registration. We do not, for example, hold that a rent charge issuing out of land not brought under the Act, cannot be made the subject of a certificate of title. Our judgment applies only to those incorporeal hereditaments which consist of mere easements as distinguished from actual estates in the land.

Order absolute.

Attorneys for the applicants :—Malleson, England & Stewart.

Attorney for the respondents :—Hornby.

SUPREME COURT, VICTORIA, 1887.] [13 V. L. R. 746.

REGINA v. AEDY.

"Transfer of Land Statute," s. 153—False declaration made "in pursuance of the Act"—Fraudulently procuring certificate of title—Evidence.

The prisoner was charged with wilfully making a certain false statement in statutory declarations in relation to an application by him to bring land under the Act, required under the authority and made in pursuance of the "Transfer of Land Statute," and he was further charged with having unlawfully and fraudulently procured from the Registrar of Titles, a certain certificate of title. The only evidence in support of such charges was that appearing upon the application, and the statutory declarations of the prisoner lodged in support of it produced by the proper officer from the Office of Titles, and the certificate of title granted thereupon, and the reasonable inference to be drawn therefrom, together with evidence that the material statements in such declarations were false :—

Held, that the evidence was sufficient to support a conviction.

Case held by a'Beckett, J., for the consideration and determination of the judges of the Supreme Court, upon the trial of one William Aedy. The learned Judge stated the following case :—

William Aedy was tried before me on the 23rd, 24th and 25th days of November, 1887, charged with making false statements in relation to an application to bring land under the Act. Before the prisoner pleaded to the presentment, his counsel objected that the present-

ment disclosed no offence, as it did not allege that the declarations were made falsely or corruptly within Sec. 39 of The Statute of Evidence, 1864, or Sec. 350 of The Criminal Law and Practice Statute, 1864. I held that the Transfer of Land Statute constituted offences which were sufficiently laid in the presentment before me, whether such offences were or were not sufficiently laid under the sections referred to. The prosecutor for the Queen stated that he did not intend to ask for any amendment, and the trial proceeded. It appeared from the evidence that when the accused applied to bring the land under the Act he was not, and that he never had been, in exclusive possession of the land applied for, and that his application was supported by two statutory declarations in which he made untrue assertions as to fencing and possession. The jury acquitted him on the first count relating to the application itself, and on the second count relating to a declaration referred to in and lodged with his application, but convicted him on the third and fourth counts. The third count charged "that the said William Aedy, on the 27th day of August, 1881, at Melbourne, did wilfully make a false statutory declaration before Arthur Rankin Blackwood, Esq., a justice of the peace for the central bailiwick, required under the authority and made in pursuance of the Transfer of Land Statute, in which the said William Aedy declared," etc. The fourth count charged "that the said William Aedy, at Melbourne, on the 15th day of March, 1882, unlawfully and fraudulently did procure from the Registrar of Titles a certain certificate of title, to wit, a certificate of title of the land mentioned and described in the first count of the presentment, contrary to the statute in that case made and provided." The prisoner's counsel contended that there was no evidence to support the conviction on the third count, inasmuch as it did not appear that the declaration therein mentioned was required under the authority or made in pursuance of the Transfer of Land Statute. The only evidence on this subject was that the clerk from the office of Titles having charge of the papers relating to

applications to bring land under the Act, produced those relating to the application referred to, and the declaration mentioned in the third count was amongst them as a document lodged in support of the application; but there was nothing further to show [*747] how it came to be lodged or that it had been required by the examiner of titles. The prisoner's counsel contended that there was no evidence to support the fourth count, inasmuch as it did not appear that the accused had procured any certificate of title fraudulently or unlawfully. The only evidence on this subject was that a certificate of title had been issued to the accused on his application to bring land under the Act, and that this application had been supported by certain statutory declarations, one of which the jury found to have contained a wilful false statement by the accused.

The following questions are reserved for the opinion of the Full Court :—1. Was there evidence to support a conviction on the third count under Sec. 153 of the Transfer of Land Statute, or was an offence under Sec. 39 of The Statute of Evidence, 1864, sufficiently charged to support a conviction under that section? 2. Was there evidence to support a conviction on the fourth count?

Sir Bryan O'Loghlen, for the prisoner :—The charges upon which the prisoner was presented were under Sec. 153 of the Transfer of Land Statute (No. 301), by which section a misdemeanor is created peculiar to that Act. The third charge was for making "a false statutory declaration, required under the authority or made in pursuance of this Act." "Wilfully making any false statement or declaration" is perjury under the general law, but the prisoner is not charged therewith. Under this Act there are several sections requiring statutory declarations, viz., Secs. 130, 131, and 134. Sec. 129 empowers the registrar to administer an oath, to take a statutory declaration, and this declaration is defined to be one made voluntarily. The present declaration was not made voluntarily, it was something that the prisoner was forced or required to make to get a

certificate. Sec. 271 of The Criminal Law and Practice Statute, 1864 (No. 233) defines perjury to be a false statement made knowingly, wilfully and corruptly. The Statute of Evidence,1864 (No. 197) makes provision for dealing with false statements (sections 34 to 40), but they all refer to those made in substitution for an oath. Sec. 37 only refers to cases under Secs. 34 to 36. Sec. 39 provides that the declaration must be "wilfully, falsely and corruptly made. Here it is said to be wilfully, but not falsely or corruptly made, though it is said that the statement itself is false. And a person could not be found guilty under that Act, unless he was charged with perjury.

[Williams, J.—It is said to be a misdemeanor under the Transfer of Land Statute].

But it may be punished with a fine only. [*748]

[Higinbotham, C.J.—The declaration on its face purports to be made under The Statute of Evidence, 1864. [a'Beckett, J.—You contend that a person might lodge, in support of his declaration, evidence as to which some of it might be deeds and other things, and some statutory declarations, and you say if one of these statutory declarations be false the person making it may be liable for perjury under the general law, but not for making a false voluntary declaration required under the authority or made in pursuance of the Act.]

Yes; Act No. 343 was passed because there was some doubt as to the meaning of the former Act, whether it referred only to substitutes for oaths or not, and is to be read with Act No. 233. It must be "falsely, wilfully and corruptly" made. Arch. Criminal Practice (20th edition), 294, citing R. V. Stevens;[1] and again, Abbott, C.J., says in Reg. v. Oxley,[2] every definition of perjury is that a person must "wilfully and corruptly" swear falsely, and this is cited with approval in Russell on Crimes, p. 37, and Archbold; and he must be charged with having wilfully and corruptly made a

[1] 5 B. & C. 246.

[2] 3 Car. & Kir. 317.

false statement, "corrupte et voluntare," Case 30, 1 Cro. Eliz. 201. The presentment states that the certificate was procured from the Registrar of Titles. Upon the evidence there is nothing to show that a certificate was procured from the registrar by any false statement or any declaration. He received the application, and the declaration in the application was found by the jury not to be false. The application under the Act would then go to the Commissioner of Titles, who would refer it to the Examiner of Titles, who would report on it and advise the commissioner, who is the judge, to adjudicate and decide whether the application should or should not be granted, and who would grant it, and direct the registrar to issue the certificate. The registrar then receives it; he does not grant the application; the commissioner does that. There is no evidence that this declaration had anything to do with the judicial act, or that the act of examiner or commissioner was affected by the fraud.

Leon (R. Walsh with him), for the Crown :—This declaration was made under the Act. Sec. 17 provides for parties bringing land [*794] under the Act. Sec. 18 provides for report of examiners and submitting the papers to the commissioner. It appears in evidence that this document was one of the papers lodged in connection with the application to bring the land under the Act. Everything done about the application is an act done in pursuance of the Act. The declaration is required in order to enable the applicant to make the application. The prisoner was doing something within the scope of the Act No. 301, and the very document is headed as being under and relating to the Act. "In pursuance of" means for carrying out the purposes of the Act, and is distinct from the words "under the authority of." It is assumed by Sec. 17 that claimants must prove that they fill the character under which they claim to be registered, and to prove this they must proceed to satisfy the registrar or any other proper officer by certain declarations, that they are what they claim to be. These declarations are, therefore, made

"in pursuance of" the Act, that is, for carrying out its requirements. This document is prepared, and the statement is made and attached to the application for the purpose of enabling the prisoner to take advantage of the privileges of the Act. As to the fourth count, it seems clear that "procuring an application to be granted" by a false declaration is included in the offence, or is the same as the offence, of procuring a certificate of title. Sec. 153 contemplates this very offence, for it makes provision for a person "assisting in fraudulently procuring."

Sir Bryan O'Loghlen, in reply:—There is no evidence whatever that this second or supplementary statement was "required" by the officer; and that was something which the Crown was bound to prove.

Cur. adv. vult.

Higinbotham, C.J.—My brother Williams has stated his view of this case in a judgment in which I concur, and which I desire to adopt as my own. I agree with him as to the inference that may be reasonably drawn from the fact, namely, that the statutory declaration on which the third count of the presentment is founded, was made in pursuance of the Transfer of Land Statute; and I further assent to the conclusion that may be [*750] drawn from that inference, namely, that the accused did unlawfully and fraudulently procure from the Registrar of Titles a certificate of title as charged in the fourth count. There was evidence, therefore, to support the verdict on each of these counts, and the conviction on both of those counts will be affirmed.

Williams, J.—The only ground on which I can support the conviction under the third and fourth counts of the presentment in this case, is that founded upon the principle of "reasonable inference." Taking the two counts seriatim, it is admitted that the statutory declaration, the subject of the third count, was not "required under the authority of the Transfer of Land Statute; but it is contended that it was "made in pursuance of the Act." I do not think there is any evidence what-

ever that it was so made, apart from what appears on the face of the document itself, and from what appears to be a reasonable inference, namely, that the declaration was required by those intrusted with the administration of the Act, for the purpose of satisfying them as to what course they should pursue with respect to the application made by the prisoner under Sec. 17. The applicant evidently relied upon exclusive possession for a long period of years in support of his application, but in the first instance supported that application with a declaration, thereby stating that he was "in possession." I do not think it is an unreasonable inference to draw that the statutory declaration in question, which stated the nature of that possession, and which was subsequently lodged and filed with the application and statutory declaration first accompanying it, in the office of the Registrar of Titles, was required by the office for the purpose of satisfying the office as to the nature of the applicant's title; see Sec. 18. For what other reasonable purpose could it have been made and lodged? Assuming this inference to be reasonable, the declaration, the subject matter of the third count, may be fairly said to have been "made in pursuance of the Act." This view is further strengthened by the heading affixed by the prisoner to the declaration —"In the matter of the application of William Aedy and the Transfer of Land Statute," the document itself thus purporting to have been made in pursuance of the Act [*751]. Then, as to the fourth count, if it be a reasonable inference that the declaration was made and lodged in order to satisfy the office as to the nature of the applicant's title, it would clearly not be an unreasonable inference that the office would not have issued to the applicant a certificate had it not been furnished by the applicant with the further statutory declaration, which had been required in order to satisfy the office as to the nature of the possession upon which the applicant based his title. I think the two questions submitted for our determination should be determined in the affirmative.

a'Beckett, J.—As to the third count, I think the declaration may be considered as a declaration made in pursuance of the Act as it was made, as has already been pointed out, and headed distinctly in the matter of an application made under the Act, and the subject of the declaration would be a most material statement as to the title of the person applying to bring the land under the Act. I therefore think the finding can properly be supported as to the third count.

With regard to the fourth count, I am unable to come to the conclusion that the offence falls within the part of Sec. 153, of fraudulently procuring a certificate of title. As I read the section, the earlier part deals specifically with a fraudulent and false statement in making an application to bring land under the Act. And it then passes on to further matters, but I think that the words "fraudulently procuring a certificate of title" do not describe an offence of fraudulently applying to bring land under the Act, in consequence of which, and after which, the certificate of title was issued. For that reason I am not prepared to affirm the conviction under the fourth count, and it is that point solely on which I differ from the other members of the Court. The result is unimportant to the defendant, as he has been found guilty of an offence under the third count.

Conviction affirmed.

Solicitors for the prisoner :—Tuthill & Geoghegan.

Solicitor for the Crown :—Sutherland, Crown Solicitor.

VICTORIA, 1887.—WEBB, J.] [13 V. L. R. 384.

MONAGHAN v. GLEESON

Vendor and purchaser—Purchaser let into possession of substantial excess over quantity of land correctly described, paid for, and conveyed—Excess brought under "Transfer of Land Statute" along with land conveyed—Right of vendor to value of excess—Compensation clause in contract—"Transfer of Land Statute," s. 144.

Where land has been sold by metes and bounds at so much per acre, the acreage within such metes and bounds being correctly stated in the contract, and the price stated accordingly, and a conveyance has been executed accordingly, the vendor is entitled to be paid for a substantial excess in quantity not arising from error in the measurements given, and lying outside such boundaries, though such excess had been occupied by the vendor as part of the farm described for sale, and the purchaser had been let into possession of it. The purchaser having brought under the "Transfer of Land Statute" such excess along with the land conveyed, without notice to or knowledge of the vendor, and having obtained the issue of a certificate in his own name.—Held, that the vendor was entitled to be paid by the purchaser the value of the excess land at the time of purchase, either under the usual condition of the contract of sale as to compensation for excess, or under the "Transfer of Land Statute," Sec. 144.

Action by Mrs. Christina Monaghan against James Gleeson to recover the value of about four acres of land which he had obtained from her.

The plaintiff was the owner of a farm near Warrnambool. In April, 1884, she sold the farm to the defendant at the rate of [*385] £44 10s. per acre, as for 56a. 3r. 25p. The defendant paid part of the purchase money and gave bills for the residue. Having obtained possession of the farm he applied to the Titles office to bring the land under the Transfer of Land Statute, and to be registered as the proprietor of the 56a. 3r. 25p. On survey by direction of the department, it was dis-

covered that there were in the farm about sixty-one acres. He then applied for a certificate of title to the whole of the land, and without notice to or knowledge of the plaintiff, obtained it. The plaintiff instituted this action to compel the defendant to pay the value of the excess. The arguments and the details of the facts sufficiently appear in the judgment.

Leon and Topp, for the plaintiff.

Hood and Neighbour, for the defendant.

Cur. adv. vult.

Webb, J.—The plaintiff caused to be put up for sale by auction on 22nd April, 1884, land described in the advertisement of sale as "part of portion 30, parish of Yangery, county of Villiers, containing 56a. 3r. 25p., having a frontage to Yangery lane and the main Woodford road, and adjoining properties of Messrs. A. & R. Urquhart and John McLachlin, rented by Mr. Michael Dowd for many years at a high rental." At the sale the biddings were taken at per acre, and the land was knocked down to the defendant at £44 10s. per acre. There were a house, fencing and other improvements on the land. On the same day a contract was signed by the auctioneers, as agents for the plaintiff, and by the defendant, in which the land was described as "all that piece or parcel of land containing by admeasurement 56a. 3r. 25p., or thereabouts, being part of portion 30, parish of Yangery, county of Villiers, together with all buildings and fixed improvements thereon." The terms of payment were one-half cash and the balance at twelve and twenty-four months, with 6 per cent. interest. In the contract the amount of purchase money was inserted as £2,532 6s. 9d., which is the product of £44 10s. per acre for the stated area, 56a. 3r. 25p. The defendant paid £1, 266 3s. 5d. [*385], and gave his promissory notes at twelve and twenty-four months for the residue of the purchase money and interest. On the next day the defendant visited the land in company with the plaintiff's son and shortly afterwards took possession of it as previously occupied by Dowd.

On 28th April, 1884, the plaintiff executed a conveyance, whereby, in consideration of £2,532 6s. 9d., she granted to the defendant, "All that piece or parcel of land containing 56a. 3r. 25p., be the same more or less, being part of portion 30, parish of Yangery, county of Villiers, commencing at the southern side of the Government road leading from Port Fairy to Woodford, at the north-east corner of the said portion, and bounded on the east by a Government road one chain wide, being a line bearing south 40 chains 58 links ; on the south by part of portion 15A, being a line at right angles to the last line, bearing west 12 chains 71 links ; on the west by a line at right angles to the last line, bearing north 30 chains ; again on the south by a line at right angles to the last line, bearing north 5 chains 91 links, and on the north-west by a Government road leading from Port Fairy to Woodford, being a line bearing north 79 degrees east 23 chains 10 links to the commencing point."

It is admitted that there is no error in computation, and that, taking the measurement given in this deed, the area comprised within them is 56a. 3r. 25p. The only abuttals given are the two Government roads, i.e., the Woodford road and Yangery lane, and portion 15A on the south.

There is no reference in the conveyance as there is in the advertisement, to the properties of Urquhart and McLachlin as adjoining the land. This deed was executed in escrow, and being produced in evidence appears never to have been registered. It has at the foot the usual receipt for the full amount of the purchase money. As appears by the correspondence, it was left with the defendant's solicitor, to be delivered up to the defendant on his promissory notes being paid. It does not appear when these promissory notes were in fact paid, and consequently when the deed became absolute, it having been up to then in escrow only. The defendant's solicitor states in evidence that neither of the notes had been paid when application was made to bring the land under the Act, but that he held the cash for their payment.

On 7th June, 1884, the defendant lodged in the Titles Office an application to bring the land under the operation of the [*387] Transfer of Land Statute, stating it as containing 56a. 3r. 25p. or thereabouts, and as described in the deed of 28th April, 1884, which appears to have been lodged in support of the application. Subsequently a survey was made of the land, and it was found that, as fenced and occupied by Dowd, it contained an area of 61a. 0r. 14p. The defendant thereupon, on 10th November, 1885, lodged in substitution for the previous application a fresh application to bring the land under the Act, stating it to contain 61a. 0r. 14p., as described in a survey plan lodged with the application.

By comparing the plan lodged in support of this second application with the parcels in the conveyance from the plaintiff to the defendant, it appears that the excess is caused to a trifling extent only, by an excess in the length of the main boundary lines of the land. The substantial excess consists of a rectangular block measuring 12 chains 12 links by 3 chains 36 links, and containing therefore about four acres, being included in the fences and occupied by Dowd, which is not included in the title deeds of the plaintiff, or in the conveyance from her to the defendant. This block abuts on the western boundary of the land conveyed, but extends in part beyond it. It is not, therefore, a question of a general excess of a few feet or inches in the measurement of one regular block of land. The excess here is mainly one quadrilateral block of four acres, capable of exact definition and location upon the ground, partially abutting upon, but not in any way incorporated with the land conveyed. Moreover, the four acres in question abut at the western boundary upon a road running into the main Woodford road, and thus access to it may be obtained independently of the land conveyed to the defendant.

On 5th February, 1886, the defendant obtained a certificate of title for 61a. 0r. 16p., that being found to

be the accurate contents of the area comprised in the plan lodged by the defendant in support of his application, and not 61a. 0r. 14p. as therein stated. It would appear that after this the plaintiff for the first time became aware of the excess of the land, and on 17th April, 1886, her solicitors wrote to the defendant's solicitor, calling attention to the fact that he was endeavouring to get a title to [*388] four acres more than the area sold to him, and proceeding: "The vendor distinctly instructs you not to hand over the deeds of the property unless the said excess in area is excised from the transfer or conveyance, or unless the purchaser pays for such excess at the rate of £44 10s. per acre." If at that time the defendant's solicitor had still held the conveyance in escrow, as the plaintiff believed he did, this would have been quite in time to enforce compensation under the contract. But not only had he then parted with the conveyance, but the defendant had already, unknown to the plaintiff, obtained his certificate of title for the entire 61a. 0r. 16p., as to 56a. 3r. 25p. of it, upon the conveyance of the plaintiff, and as to the residue of 4a. 0r. 31p. without the plaintiff's knowledge or concurrence; for both the original and substituted applications by the defendant to bring the land under the operation of the Act were made without her knowledge, and no notice was ever given to her of the intention of the defendant to endeavour to get this four-acre block included in his certificate of title.

The statement of claim was originally based wholly upon an allegation of mutual mistake, and claimed payment for the whole excess of 4a. 0r. 31p. at the rate of £44 10s. per acre. There is no doubt, and I so find, that the plaintiff intended to sell, and the defendant intended to buy the entire farm as occupied by Dowd, and that both of them at the time of entering into the contract believed that it contained an area of 56a. 3r. 25p. only, as stated in the advertisement for sale and in the conveyance.

The contract of 22nd April, 1894, contains a provision : "If any error should be discovered in the discription of the property sold, either as to quantity or otherwise, such error shall not entitle the purchaser to annul the sale, but the same shall be the subject of compensation." Taking it that the property sold was the land as occupied by Dowd, there was clearly an error in the statement of the area of the land, and the vendor, if aware of that error, might have insisted upon compensation under this clause. But the defendant contends that the conveyance having been executed, the transaction is complete as between the parties, and cannot now be re-opened. If the conveyance had [*389] given the defendant the excess now in dispute, there might have been some force in that argument. But in fact the conveyance only gave to the defendant the land for which he paid, and gave him no title whatever to the four-acre block adjoining. It is proved that the plaintiff had occupied that four acres in common with that to which she had title, for thirty-three years. It is admitted between the parties that she so occupied it for more than the statutory period of fifteen years, so that at the time of the sale she had an absolute title to that land capable of conveyance by her or upon which she could have maintained ejectment. If the defendant had sought to have had this four acres included in his original conveyance, or had afterwards sought a conveyance of it from the plaintiff, the plaintiff would at once, and before conveyance of the land now in question, have required compensation for the excess, and would, under the condition, have been entitled to insist upon it.

But by the course which the defendant adopted of, behind the back of the plaintiff, obtaining a statutory title to this land which was not included in his conveyance, and which he had not paid for, he deprived the plaintiff of all opportunity of asserting her claim for compensation. It is therefore impossible for him now effectively to rely upon the conveyance by the plaintiff to him, as depriving the plaintiff of the right to compensation for land not included in it, and which would still

remain vested in the plaintiff but for the fact of the defendant having, without her knowledge, obtained a certificate of title including it. The application by the defendant to bring this four-acre block under the Act, without any communication with or notice to the plaintiff, was wholly unjustified, and the plaintiff was entitled, so soon as she discovered the mistake in the area, to insist either on being paid for these four acres or upon having it again vested in her.

It having been strongly argued by the defendant that under the circumstances of this case the compensation clause of the contract could not now be brought into operation, the plaintiff at the trial applied for leave to amend her statement of claim by adding a paragraph claiming damages under Sec. 144 of the "Transfer of Land Statute," and I granted leave to so amend, [*390] offering the defendant an adjournment for the purpose of calling further evidence if he required it, which offer was declined.

The plaintiff had, at the time of the sale, a perfectly good statutory title to this four acres, although not included in her paper title, and if she had in fact conveyed this to the defendant without insisting on compensation, she could possibly not have been able to claim compensation afterwards. But she did not convey it, and was deprived of it by its being brought under the Act on the application of the defendant ; and the defendant having thus, by a vis major, wholly independently of the plaintiff and without her knowledge, obtained a title to this four acres, there is nothing to estop her from now claiming compensation under the contract. Or if there is, then Sec. 144 applies, and she has been deprived of the four acres through the bringing of such land under the operation of the Act, and by registration of the defendant as proprietor of it, and is entitled to damages against the defendant as the person upon whose application the land was brought under the application of the Act.

The trifling excess in the margins of the land included in the conveyance would reasonably come within the words "or thereabouts" in the contract, and "more

or less" in the conveyance. But a solid block of four acres, partially abutting upon the land conveyed, cannot be covered by such expressions.

The plaintiff is entitled, in the one aspect as compensation, in the other as damages, to the value of the block of four acres or thereabouts, i.e., the block which I have described as containing an area of 12 chains 12 links by 3 chains 36 links. The price bid at the auction was for land and buildings. None of the buildings are on this land, and it would be unfair to take the rate per acre bid as the value of it for assessing compensation under the contract. In assessing damages under Sec. 144, although the price bid might afford some evidence of value, it could not be taken as the measure of damages. Unless the parties can agree between themselves, I shall refer it to Chambers to ascertain the value of the block of land in question at the time of the defendant taking possession of it, which he states to have been a week or two after he bought, which was on the 22nd [*391] of April. The plaintiff will be entitled to payment of that amount when ascertained, together with the costs of this action.

Refer to Chambers to ascertain the value, on the 6th May, 1884, of the area of land 12 ch. 12 links, by 3 ch. 36 links, coloured blue upon the plan Ex. K. Order defendant to pay plaintiff the amount of such value, when ascertained. Order defendant to pay plaintiff her costs of this action, including her costs of such enquiry in Chambers. Refer to tax.

Solicitors for plaintiff :—Watson & Morgan.

Solicitors for defendant :—Briggs & Snowball, for Ardlie, Warnambool.

SUPREME COURT, VICTORIA, 1876.] [2 V. L. R. (E.) 197.

CUNNINGHAM v. GUNDRY.

Specific performance—Sale of land—Uncertainty of agreement—Possession—Transfer of Land Statute (No. 301), Secs. 45, 50.

Although a written agreement for the sale of land was so uncertain, as to the land intended to be sold, that it would not be enforced at law, the Court held that possession, coupled with the agreement, was sufficient to make it enforceable in equity, and that it could be enforced against a subsequent purchaser, with notice, from the vendor, notwithstanding Secs. 49 and 50 of Act No. 301.

Suit by George Cunningham against Edward Gundry and John Smart.

The material allegations of the bill were :—On the 23rd September, 1869, the defendant, Edward Gundry, signed the following agreement : "Sold to Mr. George Cunningham, part of allotment 3, in Puebla, for the sum of £4, as seen on plan below;" and the document contained a rough plan. The money was paid by the plaintiff ; he entered into, and had since continued in, possession ; and had spent a considerable sum of money in improvements. In April, 1873, the defendant Gundry sold this land, together with other land adjoining it, to the defendant Smart ; but, as the plaintiff alleged, with notice of the plaintiff's claim. The bill prayed for specific performance of the agreement of the 23rd September, 1869, and that the defendant Smart should be ordered to transfer the land therein mentioned to the plaintiff.

The answer of the defendants and the evidence, which was of a conflicting nature, are set forth at length in the judgment of the Court.

Mr. Holroyd and Mr. Worthington for the plaintiff :—

The plaintiff is entitled to the relief claimed by the bill: Robertson v. Keith,[1] Townend v. Toker.[2] The short judgment in Calvert v. Pate,[3] should not be con-

[1] 1 V. R. Eq. 11

[2] L. R 1 Ch 458

[3] Argus, 8 Aug., 5 and 6 Sept., 1867.

sidered sufficient to overrule that decision. As to the amount of consideration : Withy v. Woolley,[4] Harrison v. Guest.[5]

[*198] Dr. Mackay and Mr. Fullerton for the defendant Gundry, referred to Conquest's Case,[6] Sugden on Vendors and Purchasers (13th Ed.), 439, Calvert v. Pate.[7]

Mr. Lawes and Mr. a'Beckett for the defendant Smart :—

The contract was uncertain, and, therefore, void: Pearce v. Watts,[8] Fry on Contracts, 102 ; and the second agreement cannot confirm the first, for the measurements are different. As to the effect of the "Transfer of Land Statute" (No. 301), Secs. 49 and 50, and the meaning of the word tenant : Robertson v. Keith,[9] Calvert v. Pate.[10]

Mr. Holroyd in reply :—Uncertainty in the agreement cannot be taken advantage of by the defendant Smart: but the uncertainty is not shown. Where there is ambiguity, parol evidence may be given ; Doe d. Freeland v. Burt,[11] Paddock v. Fradley,[12] Lyle v. Richards.[13]

As between the plaintiff and Gundry, the measurements have been sufficiently fixed by the fences, and assent thereto. We are entitled to performance as against Smart : Fry on Contracts, 322. As to ambiguities, Jarman on Wills (3rd Ed.), p. 399.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

The defendant in this case, Mr. Gundry, became entitled to land, about forty-seven acres, by grant from the Crown in 1864, and was a proprietor thereof under the

[4] 7 T. R. 540.

[5] 6 De G., M. & G. 435.

[6] L. R 1 Ch. D. 334.

[7] Argus, 8 Aug., 5 and 6 Sept., 1867.

[8] L. R. 20 Eq. 492.

[9] 1 V. R. Eq. 11.

[10] Argus, 8 Aug., 5 and 6 Sept., 1867.

[11] 1 T. R. 701.

[12] 1 C. & J. 90.

[13] L. R. 1 Eng. & Ir. Ap. 238.

Act No. 301. He gave a small portion of it—less than an acre—in 1867 to Mrs. Hooper, who had been his servant. They measured the land in a manner. She built a store upon it, at a cost of £100. In July, 1869, she married the plaintiff, who thereupon took possession of the small portion, and has since remained and resided there. It had a creek to the south, a road to the west.

[*199] In September, 1869, the plaintiff wished to get a title to this land from Gundry, who consented, and executed an instrument dated September, 23, 1869, "sold to Mr. George Cunningham part of allotment 9, in Puebla, for the sum of £4, as seen on plan below;" and there was a roughly-drawn plan below showing the creek, a quadrilateral figure in lines, the length of the lines bounding north and south. The £4 price was paid, the value of the land, and Gundry could not honestly ask more. The plaintiff laid out £150 more in buildings on the land, and completed the fence.

In April, 1873, the defendant, Mr. Smart, met plaintiff near his house, who brought him there, and in conversation informed him that Gundry wanted to sell his farm. (Plaintiff's wife says she told Smart plaintiff had bought his part.) Smart wanted to purchase such, went with plaintiff to Gundry's, and Smart and Gundry proceeded to make a bargain of sale at the price of £450, to be paid by part cash, part bills to run for two years. According to the evidence of Gundry, his daughter, and the plaintiff—which Smart endeavours to contradict—plaintiff's land and fences were looked at, talked of, and expressly excluded from the proposed bargain, and Gundry says that he told Smart that plaintiff had no deed for his piece, and that if Smart thought proper, he, instead of him, might convey it to plaintiff, to which Smart assented. Smart did examine Gundry's buildings, did not attempt to examine plaintiff's, which cost £250, and would be a very material ingredient of value if he at all imagined he was purchasing them. Gundry brought Smart to his solicitor, Mr. Speed, to complete their dealing, who acted for both, Smart having a friend besides to look after his interest; and Speed was never informed of any exception to the bargain, but understood that all

the lands in Gundry's grants were to pass. And various questions were put as to whether all the land was to pass without encumbrance, which should have made plaintiff's land be mentioned, but did not.

A written agreement between Gundry and Smart, May 3, 1873, was drawn and signed. On June 30, Gundry signed a transfer, as under the Act No. 301, of the land without exception, which, with the grants, remained in the hands of Speed, to become a trustee for Smart when he paid the last bill.

[*200] There is evidence of a subsequent conversation in which Gundry reminded Smart of plaintiff's rights, that there should be no mistake. Smart states a conversation between him and plaintiff, in which the latter told him that, by a mistake, Gundry had put yards instead of feet in the conveyance to him, so he could claim land up to Smart's house. Plaintiff was not cross-examined about this. The conversation, Smart states, was in a bantering tone—if anything, apparently a hoax. If it is worth noticing, it shows that Smart supposed that plaintiff held a document from Gundry giving some rights against him.

Smart showed a disposition to dispute plaintiff's title by, on May 4, 1874, serving him with notice to quit in a month, and that he should be required to pay rent after. This put plaintiff into action, and he consulted a solicitor, who prepared a proposed transfer with a plan attached, containing much more than his land, which was sent to Gundry, and Gundry thereupon went to Smart to procure a more accurate recognition of plaintiff's title. There is a good deal of conflict of evidence as to what occurred. The plaintiff's land was measured in Smart's presence (he says, protesting that it was without prejudice to his rights); Gundry and his brother represent that Smart insisted as a condition of his recognition that he should get the £4 which plaintiff had paid for the land. There is a signed agreement, which, from comparison of writing, notwithstanding Smart's denial, I am satisfied was signed by him :—

"June 8, 1874. I, John Smart, have sold to George Cunningham, for £4 sterling, all that piece or portion of

land notified hereunder, being a portion of Crown allotment 9, Sec. 82, parish of Puebla, County Grant, according as it is now fenced by George Cunningham. Received payment same time."

This has a plan annexed of a quadrilateral with length of all sides, the north and south being a little shorter than the plan of September 23, 1869. Their agreement was on the same day handed by Gundry to the plaintiff, and has remained with him since. At the same time an I. O. U. from Gundry to Smart for £4 was prepared, and signed, and handed to Smart, and has been kept by him since. Smart and his witness say that the only writing signed was by Mrs. Cooke, Smart's housekeeper, in his name, and Smart says that he understood he agreed that plaintiff should remain for an undefined time at an undefined rent, and that the £4 was for rent, and not for purchase.

[*201] I am inclined to think that there were more meetings than one, and more signed papers than one, but adopt the paper June 8, produced, as a valid contract. About June 23, plaintiff tendered a transfer to Smart, which he refused to sign. As to their conversation, they differ; both agree as to Smart saying that his "title" was not complete until he paid the balance of his purchase money. The parties let matters remain as they were. Smart's transfer was completed at the office on the 27th April, 1875, about ten days before the last bill for the purchase-money was payable. The reason of this does not appear.

Plaintiff, through his solicitor, applied to Smart for title and transfer, and, being refused, had the bill sealed, March 9, 1876, praying a declaration that he is entitled to have the agreement September 23, 1869, specifically performed or procured to be performed by Gundry, and, if and so far as necessary, by Smart, and that Smart may be ordered to transfer the land.

I do not think that a person taking the agreement of September 23, 1869, to the land, and having the boundaries of allotment 9 shown to him, could decide what land was intended to be conveyed. I am therefore

inclined to think that it was uncertain as a written agreement, and not enforceable at law ; but, coupling it with the possession by plaintiff's wife and himself, I think it was sufficiently certain to be enforceable in equity. If so, according to my decision and views in Robertson v. Keith.[14] It was enforceable against Smart taking a transfer under the Act No. 301.

I have reconsidered the matter and retain my opinion. A case had been previously decided by the Full Court, of which I was not then aware, Calvert v, Pate.[15] As far as I can recollect the facts, land was granted by the Crown to an infant, his mother got possession of it, married, and died, and his stepfather conveyed it to his creditors. The action was an ejectment by plaintiff, having a certificate of title, claiming under the infant, against the defendant claiming under the stepfather, so that plaintiff's title was good both at law and in equity. [*202] There had been some permissive occupation of the defendant, the particulars of which do not appear, in reference to which the defendant's counsel insisted that the ejectment should be preceded by a demand of possession. The Court is reported to have said that the word "tenant" in the Act No. 301, Sec. 49, regarded tenants for years, not such as in this case. This being an ejectment, no defence of equitable title could avail or be discussed. All that could be decided was that a tenant at will was not entitled to demand of possession before ejectment by one holding certificate of title.

It has been argued on behalf of the plaintiff, that Smart's availing himself of a transfer against him after his verbal agreement of April, 1873, and written agreement of June, 1874, would be fraudulent under the Act No. 301, Secs. 49, 50, so as to make the transfer ineffectual. I express no opinion as to that, but I think it enough to say against Smart that, before he got the transfer, he contracted with Gundry to confirm plaintiff's title out of the estate which he was to acquire by it, and that it being forgotten by mistake in the docu-

[14] 1 V. R. Eq. 11.

[15] Argus, Aug. 8, Sept. 5 and 6, 1867.

ment signed at Speed's, did not avoid his contract in equity; and that again, whilst his title under the transfer was incomplete, he contracted with Gundry, June 8, 1874, to sell and convey to plaintiff, Gundry procuring for plaintiff that which he was bound to give him, and that he remains subject to perform these contracts.

I shall declare the plaintiff, George Cunningham, entitled as against the defendant, John Smart, to an estate in fee simple in the land comprised in the agreement of the 8th day of June, 1874, in bill mentioned; order the said defendant, John Smart, to execute a proper transfer of the said land to the said plaintiff at the said plaintiff's expense, such transfer to be settled by the Master, in case the parties differ; order the said plaintiff to pay the costs of the said defendant Edward Gundry, and that he be paid the said costs and also his own costs of this suit by the said defendant John Smart. Refer to tax both the said costs. Liberty to reply.

From this judgment, the defendant Smart appealed to the Full Court.

Mr. Lawes and Mr. a'Beckett, for the appellant, adduced the same arguments as before the primary judge, and cited (in addition to the cases and authorities [*203] then referred to) Munro v. Sutherland;[16] and, as to an appeal on the facts; Sugden v. Lord St. Leonard's,[17] as qualifying in Re Wolfe.[18] (Mr. Justice Fellows:—You must show that in no view could the primary judge be right.)

Mr. Holroyd and Mr. Worthington, for the plaintiff, and Dr. Mackay and Mr. Fullerton for the defendant Gundry, were not called upon.

THE CHIEF JUSTICE :—

We are of opinion that the judgment appealed from is right. I express no opinion as to Robertson v. Keith,[19]

[16] 5 A. J. R. 139.
[17] L. R. 1 P. D. 154.
[18] 1 V. L. R. I. 31.
[19] 1 Vic. R. Eq. 11; 1 A. J. R. 14.

and do not rest on the decree in that case, for the conclusion which I have drawn in the present case. The Act No. 301, Secs. 49, 50, and others, protects a purchaser of land from all incumbrances and trusts; but it does not absolve him from the obligation of performing an express contract into which he has entered, or deprive this Court of the power to enforce such performance.

It is unnecessary to decide what the document signed by Smart should be termed; it is sufficient to say that I think he recognises a trust, which can be enforced against him. I also think that Gundry was a necessary party. As to costs, the facts have been found against the appellant, and, therefore, he must be liable for them.

Mr. Justice Fellows and Mr. Justice Stephen, concurred. Appeal dismissed, with costs.

Solicitor for plaintiff :—Hopkins.

Solicitor for defendant Gundry :—Cuddy.

Solicitors for defendant Smart :—Davies & Campbell.

VICTORIA, 1886.—WEBB, J.] [12 V. L. R. 748.

TAYLOR v. THE LAND MORTGAGE BANK OF VICTORIA (LIMITED).

Transfer of Land Statute, ss. 42, 117—Caveat—Contract of sale—Specific performance—Transfer—Power and duty of transferor to have caveat removed.

The lodging of a caveat against registration of any transfer of land under the Act only throws a cloud upon the title of the registered proprietor, and does not amount to such evidence of an absolute want of title as to induce the Court to refuse a purchaser specific performance of a contract of sale on the ground that the vendor has no title.

It is the duty of the vendor to have the caveat removed, even where it has lapsed, and the registrar is in error in treating it as in existence, the vendor is bound to take the necessary steps to compel the registrar to register a transfer. [*749]

Action by purchaser against vendor for specific performance of two contracts for the sale of land, or, in the alternative, for damages for breach of contract.

Before April, 1871, the defendant, the Land Mortgage Bank of Victoria (Limited), became the owner of land, including the subject matter of this action ; and in that month a certificate of title to the land, free from encumbrances, was issued to it. On the 23rd September, 1884, the bank still held the clean certificate, and on that date one Hugh Peck lodged a caveat claiming an equitable interest as mortgagor to the defendant in this and other land, and forbidding the registration of any person as transferee or proprietor, except subject to his equitable interest. On the 9th October, 1884, notice by the Registrar of Titles of this caveat was given to the defendant ; but, notwithstanding this notice, the bank, on the 13th and 17th November, put up the land for sale by public auction, and sold to the plaintiff John Barr Taylor, a portion of the land comprised in the above certificate, by two contracts of the 13th and 17th November, 1884, respectively. The particulars and conditions of sale in neither case made any reference whatever to the caveat or Peck's alleged interest, but contained a condition in each case that "upon and at any time after payment of the whole of the purchase money the vendor will sign a proper transfer to the purchaser, such transfer to be prepared by and at the expense of the purchaser." The plaintiff paid a deposit at the time of the purchase, and subsequently the balance of the purchase money. On the 22nd April, 1885, his solicitor made a requisition that Peck's caveat should be withdrawn before completion, but receiving no answer, on the 2nd June he forwarded a draft transfer to the defendant's solicitors subject to the requisition being satisfactorily answered. Negotiations then took place between the parties as to whose was the duty to get the caveat removed. The transfer had been executed and lodged for registration, and both plaintiff and defendant contended before the Registrar of Titles that Peck's caveat had lapsed ; but the registrar regarded it as still subsisting because the Full Court had made an order upon the application of Peck that the registrar delay registering any dealings by the bank with allotment 105A, which was a portion [*750] of the land not sold to the plaintiff but included in Peck's

caveat, pending the hearing of an action by Peck against the bank, which order the registrar regarded as an extension of the whole caveat. On the 6th April, 1886, that action was dismissed without prejudice to any action which the parties really entitled to the properties might bring.

Neighbour and Hodges for the plaintiff:—The meaning of the words "proper transfer" in the condition, is a transfer which will confer on the plaintiff such a title as can be registered; for, by Sec. 42 of the "Transfer of Land Statute" (No. 301), unlike conveyances under the old law, no transfer is operative to pass any estate or interest in land under the statute unless and until it is registered. Under Sec. 117 the only person who could move to have the caveat discharged is the registered proprietor, viz., the defendant: Exp. Davies & Inman;[1] and it is submitted that it is his duty to do so. The bank sold the land, knowing of the caveat, of which the plaintiff knew nothing. Under Sec. 117, Peck's caveat lapsed after 14 days, and the Registrar of Titles acted illegally in refusing to register the transfer then, and the only person who could compel him to register the transfer was the defendant. The action commenced by Peck did not relate to the land, which is the subject of this action.

a'Beckett, for the defendant:—The defendant has done all that it was under any obligation under the contracts to do, in executing a transfer in favour of the plaintiff. The fact that that transfer has not been registered is owing to no fault on the part of the bank, but to the improper refusal of the registrar to register it, for which the bank cannot be held liable. The caveat was no obstruction to the registration, for it had properly lapsed.

Neighbour, in reply:—A vendor is bound to give a good title to the purchaser; Dart on Vendors and Purchasers (5th Ed.), 591. The caveat is an incumbrance on the title. There is no title at all under the statute until the transfer is registered; therefore [*751] it is the vendor's duty to see that it is registered, and to see a certificate of title into the purchaser's hands. The pur-

[1] 11 V. L. R. 780.

chaser is perfectly powerless, and according to Exp. Davies & Inman, the only person who can compel the registrar to register is the vendor. It is submitted that the plaintiff is entitled to have both contracts specifically performed.

Cur. adv. vult.

Webb, J.—Action by purchaser against vendor for specific performance of two contracts for the sale of land, or in the alternative for damages for breach of the contract.

On 1st April, 1871, a clean certificate of title for land, including the locus in quo in this action, was issued to the defendant, which thereupon became the registered proprietor of the land, free from incumbrances. On 23rd September, 1884, Mr. Hugh Peck lodged with the Registrar of Titles a caveat, No. 10,411, claiming an equitable estate in this and other land, and forbidding the registration of any person as transferee or proprietor, unless made so expressly subject to his claim. On 9th October, 1884, a notice of this caveat, signed by the Registrar of Titles, was served on the defendant by a registered letter from the Titles Office. Notwithstanding this, and disregarding the caveat, the defendant, by two contracts of the 13th and 17th November respectively, contracted to sell to the plaintiff two parcels of land comprised in the certificate of title and caveat already referred to. The particulars and conditions of sale make no reference to the caveat or to Peck's alleged equitable interest. The third condition in each case is, "Upon or at any time after payment of the whole of the purchase-money, the vendor will sign a proper transfer of the property to the purchaser, such transfer to be prepared by and at the expense of the purchaser." The plaintiff paid a deposit at the time of each purchase, and gave acceptances for the residue of the purchase money which have since been paid, and it is admitted by the defendant that the entire purchase-money has been paid by the plaintiff to the defendant.

On 22nd April, 1885, the purchaser's solicitor sent in a requisition that Peck's caveat must be withdrawn

before completion. [*751] No answer was returned to this by the defendant's solicitor, and on 2nd June, 1885, the plaintiff's solicitor forwarded to the defendant's solicitors a draft transfer, "subject to the requisitions delivered by me being satisfactorily answered." Further correspondence and interviews between the solicitors of the two parties took place, each asserting that it was the duty of the other to get Peck's caveat removed, but both uniting in contending before the Registrar of Titles, whom they personally jointly waited on, that the caveat had lapsed, and ought to be disregarded, and that the transfer from defendant to plaintiff, which had been lodged for registration, ought to be registered.

It appears in evidence in this action that on 9th December, 1884, the Full Court, upon the application of Peck in respect of his caveat No. 10,411, made an order "that the Registrar of Titles delay registering any dealings by the Mortgaged Bank of Victoria (Limited), of allotment 105A, parish of Nunawading, for the period of one month." This order, whatever, from its peculiar language as drawn up, its effect might be, in no way affected to deal with the land the subject of this action. But the Titles Office regarded the order as in effect an extension of the whole caveat. Before the expiry of the month's extension, Peck commenced an action against the present defendant and the Registrar of Titles, by writ of summons claiming an account as equitable mortgagor to the defendant bank, of the lands comprised in certain specified transfers to it, and an injunction to restrain the Registrar of Titles from registering any dealings by the bank with any of the land contained in such transfers. It appears in evidence that that writ of summons covered the lands the subject of this action.

No injunction was ever obtained by the plaintiff in that action, but Mr. Gibbs, the Registrar of Titles, who has been called as a witness for the defence, speaking of the practice of the Titles Office, says:—"We regard an action commenced in support of a caveat, to which action I am made a defendant, as equivalent to an injunction. We apply that equally to land already under the Act, as to land being brought under the Act"—apparently

treating Sec. 24 of the Act as applicable to land already under the Act, as well as to land being brought under the Act. For this reason [*753] the registrar refused to register the transfer from defendant to plaintiff, pending the action of Peck against the present defendant bank. On the 6th April, 1886, that action was dismissed without prejudice to any action which the parties really entitled to the properties as to which redemption was sought might bring.

It has been contended before me by the defendant that this view of the Titles Office is erroneous; that Peck's caveat had in fact lapsed, and his instituting an action claiming an injunction but without obtaining one, did not operate to keep the caveat alive; that Sec. 24 applies only to the case of bringing land under the Act, and not to a caveat against a dealing with land already under the Act, which is governed by Sec. 117. The registrar is not made a defendant in this action, the plaintiff contending that he (the plaintiff) is in no way concerned with the removal of the caveat; that it is the duty of the vendor and not of the purchaser to get it removed so as to enable him to make a good title. I am not, therefore, in a position to determine whether the registrar, in the course he has adopted, has acted rightly or wrongly. I have only heard one side of the question; I have nobody before me to represent the other. I have no power in this action to direct the registrar to register the transfer if I should be of opinion he ought to do so, and any opinion I expressed would be mere brutum fulmen and extra judicial.

The defendant urges the refusal de facto of the registrar to register the transfer to the plaintiff, as an answer to this action; and in its defence "submits that the refusal of the Registrar of Titles to register the said transfer is illegal, and that it is competent to the plaintiff to compel the registration of such transfer by proceeding against the registrar, and that this defendant is not answerable to the plaintiff for the illegal refusal of the registrar to register the transfer." The real question, therefore, which I have to determine between the parties to this action is upon which of them lies the duty of

getting the caveat removed or disregarded and the transfer registered; and in other words, has the defendant done all it is bound to do under its contract, when it has executed the transfer? and does the procuring the registration of such transfer rest wholly with the purchaser in like [*754] manner as does the registration of a conveyance under the old system of conveyancing?

In determining this question I think each case must to a great extent depend upon its own circumstances. Here the caveat was lodged and notice of it given to the vendor before the contract of sale was entered into. The caveator claims an equitable interest, as mortgagor to the vendor. The circumstances and facts necessary to rebut such a claim must be known to the vendor, and would not, in the ordinary course of things, be within the cognisance of a purchaser. A caveat so lodged must be regarded as an incumbrance or blot on the title which it is the duty of the vendor to remove. At the time this action was commenced—8th October, 1885—the defendant, as registered proprietor, was the only party who could take steps for the removal of the caveat. Exp. Davies & Inman;[2] and although the subsequent Act, No. 872, Sec. 74, enables any person claiming under a transfer signed by the proprietor to apply to have a caveat removed, that Act in no way affects the ground of the judgment of the Court, which was that having regard to Secs. 117 and 135, the registered proprietor, and not the transferee, is the proper party to apply for registration of a transfer. Both these sections are, to my mind, clear upon the point. Sec. 117 requires notice to be given to the caveator of any application for registration. It provides that except in certain cases "every caveat lodged against a proprietor shall be deemed to have lapsed upon the expiration of fourteen days after notice given to the caveator that such proprietor has applied for the registration of a transfer." No provision is made for any notice to the caveator of the application to register the transfer made by the transferee. Then Sec. 135 gives to the proprietor alone the right to require

[2] 11 V. L. R. 780.

from the registrar the grounds of his refusal to register a transfer, and to summon the registrar to substantiate and uphold such grounds. The transferee could not proceed under this section if the registrar refused to register the transfer. The difference between the registration of a conveyance under the old law, and the registration of a transfer under the statute, is manifest. Under the old law the conveyance divested [*755] out of the vendor all his estate, and when he had executed that he had done everything necessary to divest the estate out of himself and vest it in the purchaser, and he had no further concern in the matter ; the purchaser might register the conveyance, or not, as he pleased. But under the statute, Sec. 58, the registration, and not the execution of the transfer, divests the estate. Until then, the estate and interest of the proprietor remain in him ; and until then the proprietor has not done all that is necessary to divest the estate out of himself and vest it in the transferee.

In this case I regard Peck's caveat as a quasi-encumbrance, which it was the duty of the defendant to get removed. If it still subsists, it forms, until removed, an effectual obstacle to making a good title to the plaintiff. If it has in fact lapsed, and the registrar erroneously continues to regard it as existing, the defendant alone, and not the plaintiff, can take steps to compel the registrar to register the transfer. The existence of a caveat only throws a cloud upon the vendor's title, and does not amount to such evidence of an absolute want of title as to warrant me in refusing specific performance on the ground that the defendant has no title.

The plaintiff is entitled to judgment for specific performance of both contracts, with an enquiry as to title if either party desire it. If not, I will order the defendant to procure the registration of the transfer already lodged at the Titles Office, and give the plaintiff his costs of this action. If an enquiry as to title is to be directed, I will reserve further consideration and costs. If the title be reported against, the plaintiff will then

be entitled to judgment for damages on his alternative claim.

Solicitor for plaintiff :—Maddock.

Solicitors for defendant :—Brake & Gair.

VICTORIA, 1876.—MOLESWORTH, J.] [2 V. L. R. (E.) 165.

THE SHAMROCK CO. (REGISTERED) v. FARNSWORTH.

"Mining Statute, 1865" (No. 291), ss. 13, 24—Mining lease, comprising road abutting on alienated land—Right of owner ad medium filum—"Transfer of Land Statute"—Conclusiveness of certificate of title not produced.

A mining lease, under the "Mining Statute, 1865," though it may include a public road, cannot give any right to mine under the half of the road which has previously become private property by virtue of a Crown grant conveying the land abutting upon it.

Where a mining lessee has obtained a certificate of title under the "Transfer of Land Statute," he must produce it in a suit in which he would rely upon it as conclusive.

Motion for injunction.

By an indenture of lease, 12th July, 1866, the Crown, under "The Mining Statute, 1865," granted and demised unto one Clarke Magee, certain land in the mining district of Sandhurst, for a period of fifteen years. In August, 1871, Magee transferred the lease and premises thereby demised to the plaintiff company, and thereupon a certificate of title to the land comprised in the lease was, on the 12th August, 1871, issued under the provisions of the "Transfer of Land Statute" to the plaintiff company for the residue of the term. The company entered into possession, and spent large sums of money in mining. The defendant was in occupation of land adjoining the lands of the plaintiff, and the plaintiff company alleged that he had trespassed on its land and removed large quantities of auriferous quartz. The bill prayed that it might be declared that the defendant had trespassed upon the lands of the plaintiff; for an account; and for an injunction.

[*166] In answer to the plaintiffs' bill, the defendant stated that he was the owner in fee simple of allotments 11 and 12, Sec. 23B, in the city of Sandhurst. His title to allotment 12 was by Crown grant to himself, dated 30th April, 1855, and to allotment 11, by Crown grant, dated 21st December, 1854, to one Andrew McGregor, who had, on the 31st August, 1861, conveyed this allotment to the defendant. Both these allotments abutted on a public street, and were described in the Crown grants as being bounded on the south-east by the street. In virtue of these grants, the defendant claimed to be the owner in fee simple of one-half in width of the street so far as it abutted on his allotments. He had been in possession nine years, and had been carrying on mining operations; and during the last three years had been mining under the street. This street was claimed by the plaintiff company under its lease, but the defendant denied its right, and alleged that he had never trespassed upon the land claimed by the plaintiff, except upon the half of the street, which he claimed a right to by virtue of the Crown grants.

Mr. Holroyd for the plaintiff:—The first point is whether the defendant can be allowed to say, as against the certificate of title, that he, by virtue of his Crown grants, has any ownership in any part of the road by his being the owner of adjoining land. We submit that, as to the surface of the road and the mines under it, the certificate of title is conclusive. An existing Crown grant, unregistered, cannot be set up against a certificate of title. But even supposing the road is included in the Crown grants, the Crown can still give an effectual lease of the mines: Bainbridge on Mines (2nd Ed.), p. 47; Millar v. Wildish;[1] Alma Consols Company v. Alma Extended Company.[2]

Mr. a'Beckett for the defendant:—According to the decisions, the defendant is the freeholder of half the street; and the question now is between him, as Crown

[1] 2 W. & W. Eq. 37.

[2] 4 A. J. R. 144, 163, 190.

grantee, and therefore freeholder, and the plaintiff claiming under a mining lease. The freehold being the defendant's, the lease [*167] was in fact never operative: it was statutory and referred only to Crown lands. In Alma Consols Company v. Alma Extended Company, the grant was subsequent to the lease. Further, the validity of the Crown lease may be considered : Aladdin G. M. Co. v. Aladdin and Try-Again United G. M. Co.[3] Now, under the "Mining Statute, 1865" (No. 291), Sec. 24, a lease to be effectual, must be expressly confined to lands not alienated by the Crown. Again, this street was land dedicated to public use, and therefore would be exempted, Sec. 13. The plaintiff's title is put entirely on the lease ; the certificate of title is only mentioned incidentally ; but, in fact, the certificate is immaterial, for the company can have no rights apart from the lease. According to Munro v. Sutherland,[4] whatever may be the terms of the certificate, it is competent to examine the lease when the plaintiff makes it a part of his title. In fact, however, the certificate is not before the Court ; even if it were, it would give no right to the gold, the company would have to fall back on its lease, and that is void.

Mr. Holroyd in reply :—The royal mines are separated : there are in fact two estates ; and this being so, the Crown can lease the mines ; so far, the land remains Crown land.

MR. JUSTICE MOLESWORTH :—

According to the decisions of the Full Court, which I am bound to follow, a Crown grantee is entitled to half the road. That is the position of the defendant in this case. The land, immediately upon the issue of the Crown grants, ceased to be Crown land.

I think that the license under which the plaintiff claims is confined to Crown lands, that is, to lands which are not private property. I do not think that, for the pre-

[3] 6 W. W. & a'B Eq. 266.

[4] 5 A. J. R. 139.

sent purpose, the statute authorises the Crown to dispose of the mines under lands which have been alienated, and I therefore think that the plaintiff's title, being based on the original license, is bad.

[168*] It is said that the certificate of title is conclusive; but it has not been produced; and when it is said to be conclusive, it should be produced. I therefore think that, for the present, the motion should be refused; costs to be costs in cause.

Motion refused: costs to be costs in cause.

Solicitor for the plaintiffs:—Motteram.

Solicitors for the defendant:—Bennett, Attenborough & Wilks.

VICTORIA, 1879.] [5 V. L. R. (E.) 2.

THE MAYOR, ETC., OF BRUNSWICK v. DAWSON

"Transfer of Land Statute" (No. 301), s. 42—"Local Government Act" (No. 506), ss. 165, 169—Vendor and purchaser—Specific performance—Agreement for continuous use of land for particular purpose—Transfer—Incumbrance.

The defendant, the owner of land under the "Transfer of Land Statute," by deed, agreed to sell to the plaintiffs a portion thereof, for the erection thereon of municipal buildings; and the plaintiffs agreed that such land should at all times thereafter be maintained and used as a site for municipal buildings; and it was further agreed that upon payment of half the purchase money, and the erection of the buildings, the defendant would transfer the land without payment of the balance.

The plaintiffs erected the buildings and paid half the purchase money, but the defendant refused to execute an absolute transfer under the statute, as she would thereby lose the benefit of the plaintiff's agreement for continuous user.

Semble, that the agreement of the plaintiffs for continuous user would bind their successors, and that such obligation might be made an incumbrance upon the certificate of title. But, held, that at all events the defendant was bound to execute a transfer with such security as she could get.

Demurrer.

Bill by the mayor, councillors, and burgesses of the borough of Brunswick, against Emma Dawson, stating the following case:

In July, 1876, the council of the plaintiff corporation passed a resolution affirming the necessity of building new council chambers, and the defendant, who was the owner in fee, under the "Transfer of Land Statute," of a large area of land within the borough, adjoining the land the subject of this suit, knowing that the erection of the proposed buildings would add to the value of such adjoining land, on the 1st August, 1876, wrote to the plaintiff corporation, offering the piece of land in question, 100 feet frontage, at a price of £7 per foot, title under the [*3] "Transfer of Land Statute," and immediate possession to be given; and that if the site should be selected, she would give the sum of £350 as a donation towards the building when finished; and should an extension of frontage be necessary, that she would subscribe in the same proportion; as a proof of bona fides, one-half of the entire purchase money might remain in an acceptance say at twelve months (or as might be agreed upon), to be cancelled when the buildings were finished; the offer being made on the understanding that suitable buildings should be erected. The defendant was proprietor of the land as administratrix of her late husband who had died intestate, and she was beneficially entitled to one-third thereof, after payment of debts, funeral and administration expenses. The council of the plaintiff corporation by resolution accepted the defendant's offer, and an agreement for the purchase of the land, with the option of taking an additional 50 feet, was executed by the defendant and four of the councillors, but the seal of the corporation was not affixed thereto, as the plaintiff corporation desired to purchase at once the additional frontage.

An agreement was subsequently executed by the defendant, as administratrix, and sealed by the plaintiff corporation, on the 15th September, 1876, for the sale of 150 feet of the land for the sum of £1,050, £150 to be paid in cash on the 4th October, and £375, with interest, on the 15th August, 1878; and it was agreed that the land sold should at all times thereafter be maintained and used as a site for municipal chambers and offices,

to be built to the satisfaction of the defendant, or her surveyor or architect. And the plaintiff corporation agreed with the defendant to erect within two years the buildings to be used as municipal chambers. And it was further agreed that upon payment of the £150 and £375 as mentioned, and the erection of the buildings, the defendant would transfer the land without payment to her of the balance of the purchase money.

The bill alleged the observance and performance by the plaintiff corporation of the stipulations, and that the buildings were completed on the 30th September, 1877, and since then had been used as municipal chambers; and also that the defendant had enjoyed the advantages she expected to reap by her offer, [*4] having sold portions of the adjoining land at enhanced prices and otherwise.

The plaintiff corporation having performed all its obligations under the agreement, tendered to the defendant the ordinary form of transfer under the statute for execution, in which the consideration was stated at £1,050. On the 17th August, 1878, the defendant's solicitor returned it altered by substituting the words, "agreed to be paid, but whereof the sum of £525 only has as yet been paid to me," for the words "paid to me"; and offered to execute a transfer in that altered form. The bill alleged that such alteration made the transfer informal, and incapable of registration. The plaintiffs' solicitor then tendered another transfer stating the consideration to be only that actually paid in cash, £525, which, however, the defendant refused to execute. Interviews took place between the respective solicitors, in which the defendant's solicitor denied the plaintiffs' right to any transfer by which they would become registered proprietors. On the 19th October, 1878, the plaintiffs' solicitors wrote to the defendant's solicitors, forwarding a transfer in the form last sent, not insisting upon any particular form of expressing the consideration, but requesting a transfer under which the plaintiffs could become registered proprietors. On the 22nd October, the defendant's solicitors replied that they had approved of the former transfer expressing the consideration as £1,050, assuming that the plaintiffs intended paying that

sum at once, and offered to execute a transfer for that sum, giving a mortgage to the defendant for the unpaid half of the purchase money, which proposal was not, however, accepted.

The plaintiffs thereupon filed this bill to compel execution by the defendant of a transfer in such form as would enable the plaintiffs to become registered proprietors, to be prepared by the plaintiffs, and settled by the Master if the parties could not agree.

To this bill the defendant demurred upon the following grounds: (1) No title to discovery, and want of equity. (2) The contract was ultra vires and incapable of being enforced in equity. (3) If not ultra vires, it appeared by the bill that the defendant was before and at the time of the institution of the [*5] suit, ready and willing to execute such transfer as the plaintiffs were under the contract entitled to, and that the plaintiffs refused to accept such transfer. (4) That it appeared by the allegations of the bill that it was a condition of the contract that the land should at all times be maintained and used as a site for municipal chambers and offices; and the plaintiffs did not by their bill offer to execute any covenant to that effect, or in any way to secure to the defendant the benefit of such condition; but on the contrary claimed to be entitled to a transfer of the land in such a form as would enable them to become registered proprietors thereof freed and discharged of that condition.

Mr. Webb, Q.C., and Mr. McFarland in support of the demurrer:—The consideration for the agreement by the defendant is stated throughout the bill, the benefit of having the municipal buildings erected on the land. The defendant only seeks to have this secured by a covenant by the plaintiffs to use the buildings for all time as a town hall, or to have the payment of the purchase money in full without any such restriction. The plaintiffs might sell the site and buildings, or use them for an hospital, or other objectionable purpose, and remove the municipal buildings to another site; in any of which cases the defendant would lose the benefit which was the

foundation of, and forms part of the consideration for, the agreement. The plaintiffs are not, therefore, entitled to become registered proprietors of the land, free from the obligation under the agreement, for as soon as the certificate of title issues, the previous agreement will become merged in it. To protect the administratrix against the claims of the next of kin, only the consideration money actually received, £525, should appear on the transfer. The plaintiffs are not entitled to specific performance on this bill ; for, by the bill, the plaintiffs do not offer to do equity by executing a covenant or otherwise : Moxhay v. Inderwick,[1] Lukey v. Higgs.[2] The present municipal council has no power to bind its successors, and to say that for all time the municipal buildings shall be on the site, and used as such ; and, therefore, this agreement is not enforceable, all the [*6] consideration stipulated for by the defendant not being able to be given to her.

Mr. Lawes and Mr. a'Beckett for the plaintiffs :—If this be a suit for specific performance, and be resisted upon the ground only that the parties cannot agree to the form of the conveyance, the suit can be disposed of merely by a reference to the Master to settle the form. The objection now raised at the bar, that the defendant refuses to execute a transfer unless there be a covenant by the plaintiffs to use the buildings as municipal buildings, is not raised by the pleadings. By them the defendant refuses to allow the plaintiffs to become registered proprietors by any form of transfer. The defendant has contracted to execute a transfer which (Sec. 42) means giving the rights of proprietorship under the statute, and she must perform it ; if the effect of the "Transfer of Land Statute" is to place her in a difficulty, that does not release her from her obligation. The plaintiffs are not bound to offer in the bill to do anything, or to suggest any means whereby the defendant may relieve herself of the difficulty. The contract has been in part performed, and the plaintiffs cannot now raise the question as to whether the contract is ultra vires or not.

[1] 1 De G. & Sm. 708

[2] 1 Jur. (N. S.) 200.

A transfer is merely the means afforded of obtaining registration, and would not of itself merge the previous agreement. However, there is no objection to referring to that agreement as an encumbrance. By the "Local Government Act, 1874" (No. 506), Sec. 165, the municipal council may provide offices, and by Sec. 169 may enter into contracts binding upon its successors.

Mr. McFarland in reply :—The defendant is entitled to have this matter settled now, and not to be left to possible future litigation with the plaintiffs' successors: Attorney-General v. Shire of Echuca.[3] Sec. 165 of the "Local Government Act, 1874," says that the council may provide offices "from time to time" only, and under Sec. 169 any contract on this subject must be such as may be within Sec. 165. If the plaintiff cannot perform the whole of its contract, the Court [*7] will not grant specific performance. The registrar would not enter the agreement as an encumbrance.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

This case comes before me on a demurrer to a bill by the municipality of Brunswick against Mrs. Dawson, to compel performance of a distinct contract between them for sale, by the defendant to the plaintiffs, of a piece of land, to be used constantly for municipal chambers and offices. There is an agreement under seal by which the plaintiffs have covenanted accordingly, the money has been paid, the buildings erected.

The defendant's title was and is under the Act No. 301, and the plaintiffs insist that they are entitled to a legal transfer under it. Some difficulties have occurred between the solicitors as to the manner of effectuating this bargain. One difficulty has been as to the capacity of the plaintiffs to bind their successors by a covenant as to constant employment of the land under the Act No. 506. I rather think the covenant effectual. Another difficulty is as to the practicability under the Act No. 301 of conveying

3 4 V. L. R. Eq. 4.

a legal title to the plaintiffs, with the obligation for constant use of the land in a particular manner as an encumbrance. I rather think it can be done. At all events the defendant, having land under the Act No. 301, contracted with a corporation under the Act No. 506, and is, I think, bound to execute conveyance with such security as she can legally get. There has been a contest in correspondence between the solicitors, set out in the bill, as to the manner of conveyance, which may prove material as to costs, not, I think, as to the demurrer, which I overrule with costs. Answer within a month.

Solicitors for the plaintiff corporation :—Cleverdon & Eggleston.
Solicitors for the defendant :—Gillott & Snowden.

VICTORIA, 1888.] [14 V. L. R. 283.

WATSON v. THE ROYAL PERMANENT BUILDING SOCIETY.

"Transfer of Land Statute" (No. 301), s. 106—"The Instruments and Securities Statute, 1864" (No. 204), s. 107—Validity of parol contract for sale of land—Absolute transfer of land—Deed of defeasance—Fi. fa.—Entry of fi. fa. on register—Sale by sheriff—Assignment by execution debtor—Priority.

A parol contract for the sale of land may be valid, although, by reason of its not being in writing, no action can be brought upon it, nor probably any action brought in which the establishment of the contract would be necessary to the plaintiff's case.

The creation of a quasi equity of redemption in land under the "Transfer of Land Statute" mortgaged to a building society by means of the execution by the mortgagor of a transfer absolute in form and a deed of defeasance by the society, though opposed to the policy and intention of the Legislature, is not illegal, and the mortgagor's interest cannot be affected by any proceeding under Sec 106 by a creditor having an execution against him. Quaere, whether the Registrar of Titles can enter in the register book a copy fi. fa. lodged under Sec. 106 of the "Transfer of Land Statute," when the estate or interest of the execution debtor nowhere appears in that book, as where it is merely an equity of redemption under a deed of defeasance executed by a mortgagee who has taken an absolute transfer of land under the statute as a security.

Action by Jane Elizabeth Watson against the Royal Permanent Building Society and Margaret Serpine

Smith, and the Registrar of Titles, to enforce a transfer of land at Camberwell under the "Transfer of Land Statute" No. 301, sold to her by the sheriff under a writ of fieri facias issued upon a judgment recovered by one John Watson against Sarah Elizabeth Smith, who had previously mortgaged the land to the society by executing a transfer, absolute in form, though subject to a deed of defeasance executed by the society. Sarah Elizabeth Smith, being the proprietor under the "Transfer of Land Statute" of the land the subject matter of the action, transferred it to the defendant, the Royal Permanent Building Society, by a transfer, absolute in form, though intended merely as a security for an advance by the society to her. The society executed a deed of defeasance which stated that the transfer was given by way of mortgage only, and that when the principal advanced and interest had been paid off the society would re-transfer the land to the borrower, or as she should direct. The society thereupon procured itself to be registered as proprietor of the land, and on the 10th September, 1885, a certificate of title was issued to it, but the deed of defeasance was not registered. One John Watson on the 13th July, 1887, recovered judgment in the [*284] Supreme Court against S. E. Smith for £38 and costs, and on the 22nd July, 1887, a writ of fi. fa. was issued thereon addressed to the sheriff of the Central Bailiwick, and endorsed to levy £43 7s. 6d., with costs, interest and sheriff's fees, and was delivered to the sheriff for execution. On the same day a copy of the writ accompanied by a statement specifying the land as required by Sec. 106 of the "Transfer of Land Statute" No. 301, was served upon the Registrar of Titles. The land was described in the statement as the equity of redemption of the land standing in the registry book in the name of the society, and it was also stated that the society was merely mortgagee, and that S. E. Smith was entitled to the equity of redemption. The registrar refused to enter the copy writ and statement in the register book.

On the 31st August the sheriff, having duly advertised the sale, sold by auction all the right, title and interest

(if any) of S. E. Smith in the land of the plaintiff for £20, and on the same day executed a transfer to the plaintiff of all her right, title and interest (if any) in the land. The plaintiff on the same day gave notice to the society of her purchase, and on that and the following day paid to the secretary of the Prahran branch of the society the amount due on the mortgage, viz., £19 15s. 8d. On the 31st August she also lodged a caveat claiming an estate in fee simple in the land, and forbidding the registration of any other person as proprietor. On the 3rd September the secretary of the Prahran branch wrote to the plaintiff stating that there had been a mistake in connection with the sale made, and offering to return the plaintiff the amount paid by her to the society. Subsequently the amount, £19 15s. 8d., paid by the plaintiff to the society, was tendered to and refused by her. On the 3rd September a transfer of land to the defendant. Margaret Serpine Smith, was executed by the society and S. E. Smith, and lodged at the Office of Titles for registration. Notice thereof was given to the plaintiff, who at once commenced this action to redeem the land against the society and Margaret Serpine Smith, who claimed to have purchased the land from Mrs. S. E. Smith before the plaintiff's purchase at the sheriff's sale. The defendants joined in their defence, and alleged that on or about the 20th August, 1887, the defendant, Margaret Serpine Smith, purchased from S. E. [*285] Smith her interest in the land for £96. The plaintiff, by her reply, denied the alleged sale, and alleged that even if there were a sale, it was not made bona fide, but with the intention on the part of both vendor and purchaser to defeat the judgment and execution ; and by amendment allowed at the trial raised the question that the sale was void under Sec. 107 of "The Instrument and Securities Statute, 1864," No. 204, as there was no written agreement made for the purchase.

Higgins and Weigall for the plaintiff.

Hodges and Mitchell for the defendant :—Before the sale to the plaintiff by the sheriff there was a parol agreement for the sale to the defendant M. S. Smith of S. E.

Smith's interest in the land, as well as the society's interest. That agreement was perfectly valid, though under Sec. 207 of "The Instrument and Securities Statute, 1864," No. 204, no action could be brought upon it by one party against the other because it was not in writing. That section does not say, as Sec. 208 does, that the contract shall be bad, but merely that no action shall be brought upon it. Nor has the section any force as between one of the parties to the contract and a stranger: a stranger is not entitled to raise the Statute of Frauds. The evidence shows that the sale was a perfectly bona fide one, and that there was no intent, either on the part of the purchaser or of the vendor, to defeat the execution; on the contrary, it was shown that the defendant M. S. Smith had no notice of the fi. fa, nor of its lodgment under Sec. 106 of the "Transfer of Land Statute" No. 301, whereas the plaintiff, when she purchased at the sheriff's sale, had notice of the previous purchase by the defendant M. S. Smith. The plaintiff could not require the fi. fa. to be registered under the "Transfer of Land Statute," because her interest was not one recognised by the statute. She had not even an equity of redemption, for the absolute fee was in the society; she had only a right under the deed of defeasance to get a transfer on paying certain money. The Act regards only estate in land, whether freehold or leasehold (Sec. 29), and Sec. 106, providing for the entry of notice of fi. fa., deals only with estates in land, whether freehold or leasehold also. This quasi equity of redemption cannot be said to [*286] be either a freehold or a leasehold estate, and it could not be registered under Sec. 106. The Act makes no provision for registering a deed of defeasance, and Sec. 106 cannot apply to the case of a fi. fa. under which it is sought to sell an equitable interest which cannot be registered under the Act: Sander v. Twigg.[1] There is no evidence of registration under Sec. 182 of the "Real Property Statute, 1864," No. 213, and therefore the land is not bound under either Act. Besides, the Act recognises only dealings by the registered proprietor, and

[1] 13 V. L. R. 765.

therefore a transfer by the execution debtor who was not the registered proprietor could have no effect, and a transfer by the sheriff could have no further effect than one by the execution debtor.

Higgins in reply :—Under the sheriff's sale the equity of redemption in the interest in this land passed to the purchaser from the sheriff, and neither the "Real Property Statute, 1864," nor the "Transfer of Land Statute," affects his rights. Sec. 182 of the "Real Property Statute, 1864," No. 213, only states that no judgment shall bind or affect land until and unless a writ of execution shall be issued, and no writ of execution shall affect land "as to purchasers, mortgagees or execution creditors" (any notice notwithstanding), unless and until delivered to the sheriff for execution, and a memorandum containing certain particulars left with the Registrar-General ; and Sec. 185 says that that shall not affect any execution as between the parties thereto or their representatives or those deriving as volunteers under them. The "Transfer of Land Statute" provides the same saving clause. It is only against purchasers that the buyer under the execution is prejudiced. Under 19 Vic. No. 19, Sec. 176, the sheriff is given distinct power to sell lands. He sells the interest, if any, of Sarah Elizabeth Smith, and by that sale puts the purchaser in her shoes, so that if she could be compelled to make an assignment, so could the purchaser, and if she could raise the Statute of Frauds the purchaser could also. Having regard to the "Instrument and Securities Statute, 1864, No. 204, Sec. 107, there was at the time of the sale by the sheriff no contract which the defendant M. S. Smith could have enforced for the alleged purchase of the [*287] land, because the contract relied on was only a parol one, and not being in writing, although not void it was not enforceable : Notes to Birkmyr v. Darnell ;[2] Carrington v. Roots ;[3] Scorell v. Boxall.[4] Notice only binds the person getting it to the same extent as the person

[2] 1 Sm. L. C. (9th Ed.) p. 349.

[3] 2 M. & W. 248.

[4] 1 Young & Jervis, 396.

originally bound: 2 Dart. V. & P. (5th Ed.), 884, citing Taylor v. Stibbert.[5] Besides, apart from the Statute of Frauds, it is submitted that there was no definitive binding contract at all. The evidence shows that the purchaser from S. E. Smith only intended to take the land if she could find a purchaser at a profit to herself. The sale alleged depends on the evidence only of W. L. Smith and M. S. Smith, and Clark, who arranged for it, went to the sheriff's sale and bid against the plaintiff.

In any case it is submitted that the plaintiff has priority because she lodged the copy writ and statement in accordance with Sec. 106 of the "Transfer of Land Statute," No. 301. The case of Sander v. Twigg[6] by no means decides this point. The only matter decided by the Full Court in that case, which was not an upholding of your honour's judgment, was that the delivery of the writ to the sheriff does not bind. The Chief Justice and Mr. Justice Williams said that it was unnecessary to decide whether the writ could be registered under the "Transfer of Land Statute," but Mr. Justice Holroyd in an obiter dictum said that it could not be. But being a mere obiter and at variance with your honour's expressed opinion, the matter is still open for decision, and it is submitted that the lodgment copy writ and statement with the registrar before the purchase of the 22nd August, it has priority over that purchase. It makes no difference that the registrar made no entry, for Sec. 106 says "provided always that until such service as aforesaid (i.e., on the registrar of copy writ and statement) no sale or transfer under any such writ shall be valid as against a purchaser for valuable consideration," showing that the service alone is sufficient whether the registrar carries out his duty or not.

Cur. adv. vult.

[*288] Webb, J.—One Sarah Elizabeth Smith, being the proprietor under the "Transfer of Land Statute" of certain land, the subject matter of this action, borrowed money from the defendant society on the security of the

[5] 2 Ves. Jr. p. 439.
[6] 13 V. L. R. 735.

land. That security was effected by an absolute transfer by her to the society accompanied by a deed of defeasance executed by her and the society, stating that the transfer had been given by way of mortgage only, and that upon payment of principal and interest the society would re-transfer to her or as she should direct. In pursuance of this transfer, the defendant society was registered as proprietor of such land, and a certificate of title, dated 10th September, 1885, was issued to it. The defeasance was not registered. On the 13th July, 1887, one John Watson recovered judgment in this Court against Sarah Elizabeth Smith for £38. On the 22nd July, a writ of fi. fa. was issued on this judgment. On the same day a copy of this writ, accompanied by a statement of the land sought to be affected was served upon the Registrar of Titles. In that statement the equity of redemption of the then defendant in two parcels of land is mentioned, the description of the land now in question being :—"The equity of redemption in all that piece of land containing, etc., now standing in the register book vol. I., 777, fol. 355,316, in the name of the Royal Permanent Building Society, which society is a mortgagee only of the said land, the said defendant being entitled to the equity of redemption therein." On the 31st August the sheriff put up for sale by auction all the right, title and interest (if any) of Sarah Elizabeth Smith in both parcels of land, and the plaintiff became the purchaser for the sum of £20. On the same day the sheriff executed a transfer to the plaintiff of all the right, title and interest (if any) of Sarah Elizabeth Smith in (inter alia) the land now in question. On the same day the plaintiff gave notice to the defendant society of her having purchased at the sheriff's sale and paid to the defendant society's secretary, at the Prahran branch, £18 10s. 6d., the amount then claimed to be due on the mortgage. On the 1st September the same secretary wrote to the plaintiff stating that an error had been made in the amount mentioned on the previous day, and asking a further payment of £1 5s. 2d., which the plaintiff paid. On the 3rd September the same secretary wrote to plaintiff, "I am instructed by our solicitors to inform [*289] you that there

has been a mistake in connection with the sale of Mrs. S. E. Smith's land, and I shall be most happy to return you the amount paid, £19 15s. 8d." This amount was afterwards tendered by the defendant society to the plaintiff and refused by her..

She now brings this action against the society, and a Mrs. Margaret Serpine Smith (who claims as a purchaser from Mrs. S. E. Smith), to enforce a transfer by the defendant society to her. The action is defended jointly by both defendants, who allege that on or about the 20th August, 1887, Margaret Serpine Smith purchased from Sarah Elizabeth Smith her interest in the land in question for £96. To this the plaintiff replies, traversing the sale in fact, and alleging that if there was any such sale it was not bona fide, but with intent to defeat the judgment and execution. By amendment allowed by me at the trial the plaintiff also replied, the Statute of Frauds.

Upon the facts I find that the defendant, Margaret Serpine Smith, is a bona fide purchaser from the execution debtor, and that such sale was not made with intent, either on the part of the vendor or purchaser, to defeat the judgment and execution. I also find that on the 22nd August, when a parol agreement for purchase was made, the defendant Smith had no notice of the fi. fa., or of its lodgment under Sec. 106 of the "Transfer of Land Stattute." I also find that the plaintiff was a bona fide purchaser at the sheriff's sale, and that at the time of her purchase she had notice that the execution debtor had previously sold her interest in the land.

Upon these findings the question to be determined is, which of the two purchasers is by law entitled to priority? For the plaintiff it is urged that, having regard to the Statute of Frauds, there was at the time of the sale by the sheriff no valid contract for the purchase of the land by defendant Smith, her contract then existing in parol only. It is, on the other hand, contended for the defendants that the 4th section of the Statute of Frauds (now No. 204, Sec. 107) does not apply in this case, inasmuch as it only provides that no action shall be brought upon an agreement not in writing, but does

not make the contract void, as Sec. 17 (now No. 204, Sec. 104) does, and that no action is here brought [*200] upon the agreement. The plaintiff contends that the contract, not being in writing, is absolutely void, and relies upon Carrington v. Roots[7] and a passage in the notes to Birkmyr v. Darnell in Smith's Leading Cases (9th Ed.), 349. But all that Carrington v. Roots decides is, that where a contract relied on is material to the establishment of the plaintiff's case, the action cannot be maintained unless the contract be in writing. Lord Abinger there certainly uses the expression that "a contract cannot be available as a contract at all unless an action can be brought under it." But these words are larger than the point then under consideration necessitated, and the subsequent words used by His Lordship express the reason of this decision, when he says, "Wherever an action is brought on the assumption that the contract is good in law, that seems to me to be in effect an action on the contract," and, of course, in that view the 4th section applied. It is true there are other expressions in His Lordship's judgment which also appear to show that he regarded the 4th section as in effect equivalent as to lands with the 17th section as to goods, and that a contract not in writing is, by the 4th section, made altogether void. But such observations are merely obiter, the judgment there being based upon the view that the action then under consideration was in effect an action on the contract. In that case, and in Reade v. Lamb,[8] which followed it, one of the parties to the contract was suing and relying upon the contract in support of his action, which was, in effect, suing on the contract. All that was decided in the latter case was that a plea alleging that the contract sued on was not in writing was bad on special demurrer, because it was a mere argumentative traverse of the contract. In the judgments in both cases expressions are made use of that the contract was void altogether, but they must be applied to the facts of the particular actions, which were both actions

[7] 2 M & W. 248.
[8] 6 Ex. 130.

between the parties to the contract. So far as they go further than this and purport to put the 4th and 17th sections upon the same footing they are inconsistent with the later case of Leroux v. Brown,[9] in which both Carrington v. Roots and Reade v. Lamb were cited. It was then held that the 4th section applied only as to procedure, and not as to the validity of the [*291] contract, and the observations to the contrary in Carrington v. Roots and Reade v. Lamb were explained, and limited to the particular purposes of those actions. In this case the parties to the contract in question are co-defendants, and, adopting the language of the late learned Chief Justice, Sir William Stawell, in Lorenz v. Heffernan,[10] I may ask in what sense or form does the action charge the defendant on any such contract? For these reasons the objection that the defendant's contract is not in writing is untenable. There may be a valid contract for the sale of land, although by reason of its not being in writing no action can be brought upon it,[11] nor probably could any action be brought in which the establishment of the contract would be necessary to the plaintiff's case. This view, I think, explains all the instances given in the learned note to Birkmyr v. Darnell, such as Sykes v. Dixon,[12] Banks v. Crossland,[13] Stockdale v. Dunlop,[14] Coats v. Chaplin,[15] Coombs v. Bristol and Exeter Railway Co.,[16] and Felthouse v. Bindley,[17] in all of which cases proof of the contract was necessary to the establishment of the plaintiff's or prosecutor's case. There is nothing unreasonable, but quite the contrary, in saying that where two persons have entered into a contract which they are both quite willing to perform, although as be-

[9] 22 L. J. C. P. 1.

[10] III V. L. R. L. 133.

[11] [See Britain v. Rossiter (11 Q. B. D. 123), Maddison v. Alderson (8 A. C. p. 488).—Ed.]

[12] 9 A. & E. 693.

[13] L. R. 10 Q. B. 97.

[14] 6 M. & W. 224.

[15] 3 Q. B. 483.

[16] 3 H. & N. 510.

[17] 31 L. J. C. P. 204.

tween themselves they may not be legally compellable to perform it, it is not competent to a third party to say that because one of the parties to the contract cannot maintain an action upon it against the other, therefore it shall be held void for his benefit. A similar principle has been applied in the case of the Statute of Limitations, it having been frequently held that the debt barred by the statute is still a subsisting debt, and that an executor commits no devastavit in paying it.

The question, therefore, remains whether the plaintiff or the defendant Smith is entitled to priority. The sequence of events is as follows :—On 22nd July, when the writ of fi. fa. was issued, the defendant society was the registered proprietor of the land in question, the execution debtor being entitled to an equity of [*292] redemption under the defeasance. On the same day a copy of the fi. fa. was served on the Registrar of Titles, accompanied by a statement that the land sought to be affected was the equity of redemption of the execution debtor in the land. On 22nd August the defendant Smith, without notice of the fi. fa. or its service on the registrar, purchased from the execution debtor her interest in the land. On 31st August the sheriff sold to the plaintiff (who then had notice that the execution debtor had already sold her interest) all the right, title and interest of the execution debtor in the land, and on the same day executed a transfer to her of such right, title and interest. On the 1st September the plaintiff lodged a caveat claiming an estate in fee simple in the land, and forbidding the registration of any other person as proprietor. On 3rd September a transfer of the land to the defendant Smith was executed by the defendant society and the execution debtor, and lodged at the Office of Titles for registration. Notice of this was given by the registrar to the plaintiff in pursuance of her caveat, and this action was commenced. The whole question, therefore, is whether the service on the registrar on the 22nd July of the fi. fa. and accompanying memoranda bound, charged, or affected the execution debtor's interest in the land by virtue of Sec. 106 of the "Transfer of Land Statute." If so, the defendant Smith could, by her purchase of 22nd August,

acquire no right against the purchaser from the sheriff. If not, then the defendant Smith, by her purchase of 22nd August, acquired priority over the plaintiff as purchaser from the sheriff on 31st August. In Sander v. Twigg[18] the fi. fa. had not been registered, either under the "Transfer of Land Statute," Sec. 106, or the "Real Property Statute," Sec. 182, and it was there held by me, and affirmed by the Full Court, that a transfer by the sheriff to a purchaser at the sheriff's sale was inoperative as against a prior purchaser for value from the execution debtor. In delivering judgment, I expressed an opinion that the fi. fa. might have been registered under Sec. 106, but that was merely obiter, and an opinion to the contrary effect was expressed by the learned Chief Justice and my brother Holroyd on the hearing of the appeal. I have in this case more fully considered the point which now, for the first time, arises for judicial determination, and I feel very [*293] much pressed with the difficulty suggested by my brother Holroyd as to how and when the registrar is to enter the copy fi. fa. in the register book, as required by Sec. 106, when the estate or interest of the execution debtor nowhere appears in that book. I may remark in passing, that the whole difficulty in this case, as in Sander v. Twigg, arises from the mortgagor and mortgagee agreeing together to adopt a form of security not contemplated in the "Transfer of Land Statute." If a mortgage as provided for in Sec. 83 had been given, the execution debtor could have continued the registered proprietor, and a copy fi. fa. could clearly have been registered under Sec. 106. Here a quasi equity of redemption not under the "Transfer of Land Statute" has been created in land under the statute, and however that may be opposed, as I think it is, to the policy and intention of the Legislature, there is nothing which renders it illegal, and the mortgagor's interest cannot, as I now think, be affected by any proceeding by the execution creditor under Sec. 106. That being so, the purchase by the defendant Smith from the execution debtor is valid, and has priority over the transfer by the sheriff to the plaintiff.

[18] 13 V. L. R. 765.

Upon the question of costs the right of the plaintiff to redeem was, in the first instance, recognized more than once by the defendant society. Subsequently the society disputed her right, and tendered her back the money paid by her, accompanied by a letter alleging misrepresentation on her part, which has not been attempted to be proved. Moreover, the plaintiff may have been misled by observations which fell from me in Sander v. Twigg, which was, at the time of the transactions in question, under appeal. The two defendants have joined in their defence and must stand or fall together upon the question of costs. Under the circumstances, I give judgment for the defendants, without costs.

Judgment for defendants without costs.

Solicitor for plaintiff :—R. H. Smith.

Solicitors for defendants :—Davies, Price & Wighton.

VICTORIA, 1871.] [2 V. R. (M.) 27.

MATT v. PEEL.

No. 291, s. 24—Lease—Proviso for forfeiture—Estoppel—Certificate of title—No. 301, s. 49.

A lease issued under Sec. 24 of the "Mining Statute, 1865" (No. 291), in the form prescribed by regulations of 2nd March, 1866, (on the part of the lessee) these presents shall be voidable at the provided as follows :—"If there shall be a breach of covenant will of the Governor in Council ; and in case the Governor in Council shall declare these presents void, the term shall cease and the declaration be conclusive evidence of breach in all Courts.

Semble, The introduction of such a proviso is opposed to the policy of the Act and ultra vires.

But, held, that the lessee executing such a lease was bound by the proviso and estopped from objecting to it, and that his term was effectually determined by such declaration without notice to him or evidence of any breach of covenant.

A certificate of title under "The Transfer of Land Statute" (No. 301), that the holder is the proprietor of a leasehold estate, etc., although made paramount by Sec. 49, cannot defeat the right of the Crown to determine the lessee's estate.

Appeal from an order of the Judge of the Court of Mines for the Castlemaine District. The case stated was as follows :—The plaintiff sought a declaration of his

right to possession of land which had been demised to Alfred Meyer by mining lease under the provisions of the "Mining Statute 1865," on the 9th of September, 1869, in the form prescribed by the regulations (containing a special proviso set out at length in the judgment). In December, 1869, Meyer, by consent, assigned his lease to the plaintiff, and in March the plaintiff procured a certificate of title to the lease under the "Transfer of Land Statute." The plaintiff entered into possession and paid rent until September, 1870, when rent was refused. On the 16th of October a declaration of forfeiture was made by the Governor, and notice thereof was published in the "Government Gazette" on the 21st day of October, 1870, as for "breach of the labour covenant." The plaintiff had received no notice of any breach of covenant having been committed. On the 23rd of October in the plaintiff's absence, the Government mining surveyor entered on the land and removed the boundary posts. On the 24th the defendant marked out the ground and applied for a mining lease. The plaintiff also applied for a new lease of the same land. The plaintiff and defendant afterwards agreed to take a joint lease which the warden recommended, but the [*28] defendant obtained a lease in his own name on the 31st August, 1871. The defendant who had remained in possession, excluded the plaintiff, who thereupon instituted a suit to establish his title under the old lease. Judgment was given in his favour, with damages for encroachment. This was the order appealed from.

Mr. J. W. Stephen and Mr. McFarland for the appellant :—The plaintiff's only title was under a lease which had been determined by declaration of forfeiture. The lessee expressly covenants to accept the lessor's declaration as sufficient evidence of forfeiture, and it is therefore unnecessary to prove any breach of covenant for which the lease might be determined. The Crown had lawfully resumed possession when Peel put in his pegs, which is the trespass complained of. Matt's possession had then been lawfully determined. The certificate of title in no way improves the plaintiff's position. The certificate is subject to the conditions of the lease ; it

does not control or vary any rights under the lease or impose any additional formality by putting an end to the lease. The term is gone, and the certificate of title is only to the lease, not to any estate in the land independently of the lease: McDowall v. Myles,[1] Kavanagh v. Gudge,[2] Turner v. Meymott.[3]

Mr. Holroyd and Mr. Casey for the respondent :—The lease was granted under a statutory power and must conform to it. It contains a provision that it shall be voidable at the will of the Governor in Council, which is ultra vires, and under this provision a declaration of forfeiture has been made. The declaration is bad on this ground, and is also bad because no breach of covenant has been proved. Whatever may have been the intention of the clause, the effect of the preliminary words, "If there shall be a breach," is to govern all its provisions, and a breach of some sort must be proved before the declaration can be operative: Forster v. Haggart.[4] Apart from the inoperative declaration the lease has been in no way determined. There has been no "recovery" of the land within the meaning of Sec. 42 of the "Mining Statute, 1865." The term has never been effectually determined, and is still subsisting and entitled the plaintiff to succeed. The certificate of title showed the plaintiff to be proprietor of a leasehold estate and to defeat that title the lease must be shown to have been properly determined. No proof of determination has been given. The lessee is not bound by the substitute for proof provided in the [*29] lease as the clause was ultra vires; he could take the benefit of the statute without subjecting himself to an illegal addition to the statutory requirements: Regina v. Hughes,[5] Soward v. Leggatt,[6] Alladin v. Alladin and Try Again Company,[7] Mulcahy v. Walhalla Company.[8]

[1] 6 W. W. & A'B. L. 16.
[2] 5 Man. & G. 726.
[3] 1 Bing. 158.
[4] 15 Q. B. 155.
[5] L. R. I. P. C. 81.
[6] 7 C. & P. 6, 13.
[7] 6 W. W. & A'B. E. 266.
[8] 2 A. J. R. 93.

Mr. J. W. Stephen in reply :—The plaintiff is estopped from objecting to the conditions of the lease under which he claims, he cannot take the benefit without the burden. If the form of lease was objectionable he should have had it rectified, but having executed it he is bound by it.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

This case comes before me as an appeal from the decision of the learned Judge of the Court of Mines, Castlemaine District, for the plaintiff, Mr. Matt, against the defendant, Mr. Peel, now appellant. The "Mining Statute," No. 291, Sec. 24, authorised the Governor in the name of Her Majesty to grant leases of Crown lands for terms of years for mining purposes. The 42nd section authorised the Governor in Council to make regulations not contrary to the provisions of the Act, prescribing among other things the form of leases, the covenants, conditions, reservations and exceptions to be inserted in such leases. The Governor in Council, as in pursuance of this authority, made regulations on the 2nd March, 1866, gazetted March 6, fixing amongst other things, forms of leases containing various covenants and provisions, amongst others: "If there shall be a breach of the covenants and provisions herein contained on the part of the lessee, his executors, administrators, or assigns, then that these presents shall be voidable at the will of the Governor in Council, and in case the Governor in Council shall by writing under his hand declare these presents void, the said term shall cease and determine both at law and in equity ; and such declaration shall be conclusive evidence in all Courts of law and other jurisdictions in the colony of a breach of the covenants and conditions herein contained, sufficient to sustain such declaration having been committed ; and also therefrom it shall be lawful for Her Majesty, or her agents and officers, without any previous demand [*30] whatsoever, to enter forthwith into and upon the said land hereby granted, and the same to repossess and enjoy as fully and effectually as if these presents had not been made,

and the said lessee, his executors, administrators, and assigns, to expel and remove without any legal process, and in case of such entry and any legal proceedings taken in respect thereof the defendant in such proceedings may plead leave and license in bar thereof; and these presents shall be conclusive evidence of such leave and license by the lessee, his executors, administrators, and assigns, or other the plaintiff or plaintiffs in such proceedings, for such entry or other matters complained of in such proceedings." A private lessor might, I think, introduce such provisions for the termination of a lease upon a declaration by himself, with the advice of others that a covenant had been broken. There would be nothing repugnant to the estate conveyed—no illegal or immoral object in such a provision. But the policy of the Act, was, I think, the encouragement of mining industry, and securing a public revenue, giving to such persons as the Governor for the time being might approve secure tenures of mines for such term short of the limit as he might think fit, subject to such payments and the performance of such covenants as he with his council for the time being might think necessary for the purposes in question. But it was not, I think, consistent with the policy of the Act to reduce such tenancies to tenancies at will, or to invest a body not possessed of powers for judicial investigation of facts with the conclusive determination of facts which should constitute a forfeiture, and if any legal proceedings could be taken before me to prevent the imposition of such a form of lease as a condition of getting any, I should be inclined to say that the imposition was ultra vires; but as the granting of any lease is perfectly discretionary it would not be easy to devise such legal proceedings.

The plaintiff below, respondent, is assignee of Mr. Meyer, who accepted such a lease, 2nd September, 1869, for 15 years. In October, 1870, His Excellency was advised to declare the lease forfeited for breach of the labour covenant, and accordingly, by writing under his hand as Governor in Council, so declared. The forfeiture was gazetted 21st October. On the 23rd of October the Government mining surveyor removed the plaintiff's

posts. On the 24th October the defendant marked out the land, preliminary to application for a mining lease, and entered into possession of it, and he has since so remained. The plaintiff, before this forfeiture, had applied for a new lease of an increased area, and proceedings were had before a warden, between the [*31] plaintiff and defendant contending for their respective applications, and a compromise was made between them, providing, amongst other things, that a joint lease should be granted to them, which the warden recommended that the Government should do; but for some reason the Government preferred the defendant.

The plaintiff commenced the present action by a plaint seeking to be put into possession of the land under the lease of 9th September, 1869. Pending the suit the defendant got his lease. The learned Judge made an order in favour of the plaintiff with costs. Although, as I have said, I should hold the fixing of the form of the lease as ultra vires, I cannot see my way to deciding that the plaintiff can insist that the lease is effectual so as to pass an estate to the lessee, and ineffectual as to providing for its termination; that he took a lease which the Government might give or withhold, which he had no right to insist upon, and then reject the terms it imposed. I have not been referred to, or been able to find, any authority for such a claim. I think the plaintiff is estopped from making it, that the declaration of the Governor in Council conclusively as against him determined the lease as to estate and his rights and liabilities.

As I understand the case, the Government took possession without legal process, as by the provisions of the lease it ought, and the defendant entered upon the possession of the Government (I should say unwarrantably), not on the possession of the plaintiff. The plaintiff also relied upon his having obtained a certificate of title from the Office of Titles, 25th March, 1870, that he was "The proprietor of the leasehold estate for fifteen years from the 9th day of September, 1869," etc., but such certificate I think cannot defeat the right of the Crown to determine the estate. Under No. 301, Sec. 49,

the land in a certificate is "subject to the reservations, exceptions, conditions, and powers, if any, contained in the grant thereof." See also Sec. 29. This is not a lease made under the provisions of the Act, Sec. 75, and following, and Sec. 80 is beside the question. So far as the case sent to me discloses, the merits are with the plaintiff, so I shall give no costs against him. Reverse the decision, dismiss the plaint without costs, let the parties abide their own costs of the appeal, return the deposits.

Solicitors :—Wyburn—Cleverdon.

VICTORIA, 1872.] [3 V. R. (E.) 61, also 3 A. J. R. 13.

HODGSON v. HUNTER.

"Transfer of Land Statute" (No. 301), s. 24—Jurisdiction of Supreme Court—Volunteer—Imperfect gift—Possessory title—Adverse possession—Statute of Limitations—Parties—Multifariousness.

The earlier part of Sec. 24 of the "Transfer of Land Statute" (No. 301), creates no new jurisdiction in equity ; but the latter part of that section creates a new jurisdiction in the Supreme Court or a Judge to stay the bringing of land under the Act.

The principle that the Court will not assist a volunteer claiming under an imperfect gift applies only as between the volunteer and his donor, and affords no defence to a suit by the volunteer against a stranger.

A volunteer with no conveyance of the legal estate entering upon land under a gift and remaining fifteen years in possession, acquires an adverse title against the donor, and no stranger can resist its assertion because originating in a gift.

It is no answer to a suit by a person who has been for more than fifteen years in possession of land, for a conveyance of the legal estate, that he has a complete legal title by adverse possession and therefore wants no assistance of the Court.

A stranger cannot take advantage of the fact that the plaintiff's rights are barred by the Statute of Limitations as against a co-defendant.

On bill alleging an equitable title in the plaintiffs to certain lands, on an application by the defendant to bring part thereof under the "Transfer of Land Statute," and that the plaintiffs had lodged caveats against the application, alleging nothing as to the defendant's title, but praying that he might set it out, and that he might be restrained from bringing the land under the Act.

Held, on demurrer, that no equitable rights arose from the application to bring the land under the Act ; and that the persons in whom the legal estate appeared to be outstanding were necessary parties.

The bill was then amended by adding the persons in whom the outstanding legal estate was vested, as parties, and praying a conveyance from them; alleging that by reason of the defendant's application to bring the land under the Act they refused to convey unless under the direction of the Court. The Registrar of Titles was also made a party, and discovery of the applicant's title was sought from him, and an injunction prayed against him and the applicant. On demurrer by the applicant (the original defendant),

Held, that the plaintiff's right to the conveyance sought from the holders of the legal estate was sufficient to sustain the suit as against them and the demurring defendant, although they might not be entitled to the relief sought by injunction; and that the bill was not multifarious as to the demurring defendant.

[*62] Demurrer.

The bill alleged that in December, 1840, John Hodgson and William Mackenzie were seized in fee of lands at Jika-Jika; that in the same year they sold to J. W. Thurlow the whole of these lands, receiving the purchase money and giving a memorandum of the sale; that the lands were subdivided into lots for sale, and many of them sold by auction; that on the 5th July, 1842, Thurlow sold his right, title and interest in the unsold lots to Joseph Hodgson, and signed a memorandum of the sale acknowledging receipt of the purchase money; that on the 22nd July, 1843, Joseph Hodgson executed a declaration of trust as to these unsold lands in favour of his sister Frances Hodgson, one of the plaintiffs; that on the 24th December, 1870, Thurlow executed a conveyance of all his estate and interest therein to Frances Hodgson. The bill then set out certain mortgages to Young and Trollope by Frances Hodgson, and a conveyance by her subject to such mortgages to herself and the co-plaintiffs Rolls and Bennet, and alleged that on the 23rd December, 1871, the assistant Registrar of Titles gave notice, by advertisement in the Argus newspaper, of an application by the defendant to bring land (described) under the provisions of the "Transfer of Land Statute;" that the lands comprised in the notice formed part of the unsold lands comprised in the declaration of trust and conveyance by Thurlow; that the plaintiff, Frances Hodgson, lodged a caveat in the proper office against the application; and that she and the other plaintiffs also lodged a joint caveat. The allegation as to possession was as follows:—"The plaintiff Frances Hodgson

entered into possession of the whole of the lands included in the said declaration of trust, and has sold portions thereof and given possession to the purchasers, and since the 22nd day of July, 1843, the plaintiff has been in possession of the land comprised in the said application of the defendant." The bill submitted that the plaintiff had a title to an estate in fee in the land comprised in the application as against the defendant, and required the defendant to set forth the particulars of the title claimed by him, and prayed that it might be declared that the plaintiffs were entitled to such estate as against the defendant, and that he might be restrained from further proceeding with his application.

The defendant demurred on the following grounds :— (1) Want of jurisdiction. (2) Want of equity. (3) Uncertainty. (4) That John Hodgson and William Mackenzie and Young and Trollope were necessary parties. [*63].

Mr. J. W. Stephen and Mr. a'Beckett for the demurrer:—The bill shows no equity against the defendants ; no priority of title is alleged as between him and any of the plaintiffs, and no trust appears except a trust in Hodgson and Mackenzie, holding the legal estate for the plaintiff Frances Hodgson. They are not made parties, and would be necessary parties if the bill is to be regarded as seeking to complete a title acquired through them : Talbot v. Hope Scott.[1] Consistently with the bill, the defendant may be a purchaser from them for value without notice. There is no certain allegation as to possession of the land, and no equity can be raised which depends upon possession. The plaintiff can have no right to relief under the "Transfer of Land Statute." Secs. 23 and 24 are the only sections bearing upon the point, and the order thereby contemplated is an order in a suit instituted in accordance with existing law, as by cestui qui trust to restrain the improper action of his trustee, or seeking relief against fraud ; no new ground for equitable interference is introduced. The Court of competent jurisdiction mentioned in Sec. 24 is a Court already competent, not made competent by the section.

[1] 4 K. & J. at p. 112.

The bill does not allege that the caveats are entered in the form required by the Act, as they are not stated to particularise the estate or interest claimed, as provided by Sec. 22. All the mortgagees should be parties to the bill. Trollope and Young appear to have an interest as mortgagees, but are not before the Court.

Mr. Holroyd and Mr. Lawes for the bill :—The bill shows a right to the land claimed, and irreparable injury will follow if it be brought under the Act, as the right will then be barred. The course prescribed by Sec. 24 is intended to apply to every case in which the caveator contests the applicant's title, and is not confined to cases in which any fiduciary or other relation cognisable in equity exists between them : In re Power.[2] There is no remedy at law where, as in this case, the caveator is in possession. The defendant's claim to the land is sufficient privity of estate between him and the plaintiff to sustain the suit. Hodgson and Mackenzie are not necessary parties. We want no relief from them. The plaintiff's rights against the defendant do not depend upon acquiring the legal estate, and they are willing to leave it outstanding. The right to an injunction is sufficiently shown : Smith v. Scottish and Cornish Company.[3]

Mr. J. W. Stephen in reply.

Cur. adv. vult.

[*64]

MR. JUSTICE MOLESWORTH :—

This case comes before me upon demurrer to the plaintiff's bill. The bill states that Messrs. John Hodgson and Mackenzie were seized of the land in question in 1840, and sold to Mr. Thurlow by agreement in writing for a price paid. It then traces the equitable title from Thurlow to the plaintiff Miss Hodgson ; states mortgages by her, one to Mr. Young, another to Mr. Trollope, then a conveyance by her, subject to those mortgages, to herself and the co-plaintiffs Messrs. Rolls and Bennett conjointly. The bill alleges as to the defendant Mr. Hun-

[2] 6 W. W. & A'B. L. 81.
[3] 2 W. W. & A'B. L. 121.

ter that the assistant Registrar of Titles gave a newspaper notice that Hunter applied to bring the land in question under the provisions of the "Transfer of Land Statute;" that the plaintiff Miss Hodgson lodged one caveat against that application, and all the plaintiffs another. It insists that the defendant should set forth his title, and prays for a declaration of plaintiff's title against the defendant to an estate in fee simple, and that the defendant be restrained from his application to register. The bill states that the plaintiff Miss Hodgson, has been in possession since 1843—not distinctly ever since 1843. It does not negative the defendant being in possession now. It gives him no colour of title, it does not in strictness show that he ever claimed any. It shows no relation or obligation whatsoever between him and the plaintiff.

It is sought to sustain this bill upon an equity created by the "Transfer of Land Statute" (No. 301), Sec. 24, which says :—"That after the expiration of one month a caveat shall be deemed to have lapsed unless the person by whom the same was lodged shall within that time have taken proceedings in a Court of competent jurisdiction to establish his title to the estate specified in the caveat, and shall have given written notice thereof to the registrar, or shall have obtained and served on him an injunction or order of the Supreme Court or a Judge restraining him from bringing the land under the Act." I do not think that the part as to the proceeding in a Court of competent jurisdiction could be taken to create a new jurisdiction of Courts of Equity, to protect persons having legal or equitable titles against the inconveniences resulting from an improper registration of title. It directs such proceeding as would be right before, according to the interest of the caveator being legal or equitable, and makes notice of that proceeding upon the registrar a stop to him.

[*65] It is argued for the plaintiff, that being in possession, and the defendant not being in possession, they could not proceed by ejectment. I do not think that distinctly appears. The plaintiff shows a legal

estate as in trust for them in Hodgson and Mackenzie. They say nothing as to these trustees being willing or unwilling to assist them as to the legal estate. Assuming that plaintiffs were in possession, the defendant not, and there being no special equitable case against the defendant, the difficulty of there being no possible proceeding might arise. I rather think that a special jurisdiction is created under "shall have obtained and served," etc., which would embrace not only that difficulty, but cases in which the caveator could not with the necessary rapidity launch a well-arranged proceeding in a competent Court. The provision is for a kind of injunction on the registrar himself, or something besides a proceeding mere notice of which on him would effect the object of stopping him. The Full Court in re Power[4] decided that a Judge could not exercise such powers by summons in Chambers from the distinction shown in the Act between a Judge so acting and otherwise; and apparently intimated an opinion leaving the latter part of the section as practically inoperative. I rather think otherwise. I think the Court or Judge might stay registration, bringing the parties before them, and, upon hearing them, put doubtful questions into a course of legal determination within limited time, so as to uphold the policy of the Act, shown in its preamble, to bring all titles into a state of simplicity. It would be, I apprehend, competent for the Judges, under Sec. 152, to direct the details of such procedure. The present bill has no pretence of being under the latter part as it is not against the registrar at all. It does not state the estates claimed by the caveat. It is altogether defective, as under any old equity jurisdiction, in want of equity and distinctness of object; and would be objectionable, I think, for want of parties, as seeking to involve the defendant in a suit the determination of which in his favour, would leave him exposed to litigation with John Hodgson, Mackenzie, Young and Trollope.

Demurrer allowed with costs; liberty to amend within a month.

[4] 6 W. W. & A'B. L. 81.

The bill was amended by alleging that the legal estate in the land was outstanding in persons deriving title from Hodgson and Mackenzie who [*66] were made defendants; that the plaintiff Frances Hodgson had been in possession ever since the execution of the declaration of trust; and that the defendant Hunter had never been in possession. Young and Trollope, mortgagees, were made defendants as such, and William Henry Archer, Registrar of Titles, was added as a defendant. The amended bill prayed that the defendants, having the legal estate might be directed to convey to the plaintiffs, that the Registrar of Titles might set out the title under which Hunter claimed, and that he and Hunter might be restrained from bringing the land under the Act. It contained an allegation that Hunter falsely alleged that he had bought from Hodgson and Mackenzie, and that the defendants in whom the legal estate was outstanding, "have, in consequence of the said application, declined to convey the legal estate without the sanction of the Court."

The defendant Hunter demurred to the amended bill on the following grounds:—(1) Want of equity. (2) No title to the land shown by the plaintiff. (3) That if the land were brought under the Act it would be still subject to any rights subsisting under adverse possession. (4) Want of jurisdiction to restrain the Registrar of Titles; and (5) Multifariousness.

The Attorney-General (Mr. J. W. Stephen) and Mr. a'Beckett for the demurrer:—No new equity is introduced against the defendant Hunter by the amendment. He is not a necessary party to the relief sought against the holders of the legal estate, as the plaintiff Miss Hodgson is a volunteer under an imperfect gift which equity will not complete. Moreover the plaintiff's claim to the legal estate is barred by the Statute of Limitations. No jurisdiction is shown to restrain bringing this land under the Act, which is the real object of the suit.

Mr. Holroyd and Mr. Lawes for the bill:—The gift by Joseph Hodgson was completed so far as he was con-

cerned, and transferred the equitable fee to Frances Hodgson entitling her to the conveyance sought by the bill. Her possession would prevent the application of the Statute of Limitations, and the statute can in no way be taken advantage of by the defendant Hunter. The bill alleges that his claim prevents the plaintiff from getting a conveyance, and this gives an equity apart from the right to restrain the application to bring the land under the Act. There [*67] is only a right to the discovery of the title claimed by Hunter independent of the right to relief. One defendant cannot object that the bill is multifarious as to another, and the bill is not multifarious as to Hunter.

The Attorney-General in reply.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

This case comes before me on demurrer of the defendant Mr. Hunter, to the bill of the plaintiffs, Miss Hodgson and others. I already gave judgment on a demurrer of the same defendant to a bill of the plaintiff allowing it, with liberty to amend, and am now dealing with the amended bill.

It states that Messrs. John Hodgson and Mackenzie in the year 1840, mortgaged sections 54, 55, 67, Jika-Jika; afterwards sold to Mr. Thurlow by memorandum in writing; afterwards paid the mortgage and obtained a reconveyance of the legal estate as tenants in common in fee simple; that Thurlow sold portions of the land in allotments, and procured conveyances from John Hodgson and Mackenzie to the respective purchasers; that Thurlow on 5th July, 1842, sold all his right, title and interest in all the land then remaining unsold to Mr. Joseph Hodgson, and executed a written memorandum in the words, "I have this day sold to Joseph Hodgson all my right, title and interest in and to all the unsold portions of sections 54, 55, 57, etc., for the sum of £250, which I acknowledge to have received from the said Joseph Hodgson, and which I undertake to convey to him or whom he may appoint." That thereupon Joseph

Hodgson entered into possession. The bill further states that Joseph Hodgson, 22nd July, 1843, executed a declaration of trust in favour of his sister, the plaintiff, Miss Hodgson, by an instrument written under the last-mentioned memorandum, in the words, "In consideration of the love and affection which I bear my sister Frances Hodgson I do hereby give, assign, transfer and set over all my right, title and interest in and to all the said portions of land referred to in the above memorandum signed by J. W. Thurlow, and dated 5th July, 1842, and I direct him to convey the same to my said sister." That Thurlow, 24th December, 1870, executed a conveyance of all his estate [*68] and interest in the said sections to Miss Hodgson. The bill then states several conveyances by her to the co-plaintiffs, and mortgages to certain defendants. Then, that on 23rd December, 1871, the Assistant Registrar of Titles gave notice by advertisement according to the fact, that an application had been made by the defendant Hunter to bring described land, portion of Sec. 67, etc., under the provisions of the "Transfer of Land Statute;" that the described lands form part of the land mentioned in preceding paragraph, that is of the land affected by the memorandum to and from Joseph Hodgson. The bill further states that the plaintiff Miss Hodgson entered into possession of the land mentioned in the declaration of trust, sold portions thereof, and that ever since the 22nd July, 1843, she had been in possession of the land comprised in the said defendant's application, and that the plaintiffs are now in possession. That the defendant falsely alleges that he purchased the land comprised in the said application from John Hodgson and Mackenzie. That he has never been in possession of any part of the said land. The bill further states that John Hodgson died intestate, leaving the defendant Mr. Robert Buckley Hodgson his son and heir, and so having the legal estate in the moiety of the land; and that Mackenzie is dead, and the legal estate in the other moeity of it has, by mesne assignments, become vested in the defendants Robert B. Hodgson, Duffett and Rucker. That these defendants Robert B. Hodgson, Duffett and Rucker have in consequence of the application of the defendant Hunter declined to convey the legal

estate in the land comprised in the application to the plaintiffs, and still decline to do so without the sanction of this Court. The bill prays amongst other things a declaration that, subject to mortgages admitted to certain defendants, the plaintiffs are entitled to have the land comprised in the application of defendant Hunter conveyed to them in fee simple, and a decree that the defendants Robert B. Hodgson, Duffett and Rucker, shall convey the same accordingly.

The plaintiff's bill, I think, shows facts which, if true, entitle him to this relief against these four defendants, and is not multifarious as to them.

It has been argued for the defendant Hunter that the plaintiff Miss Hodgson's title from her brother is as a volunteer and that the Court will not assist volunteers. That is, I apprehend, true only as to volunteers seeking to establish title against their donors or those claiming under them. Further, I think that the memorandum of 22nd July, [*69] 1843, operated as a direction to Thurlow to convey to the plaintiff, which has been carried out, so that the gift is a matter executed. Further, that a donee entering under a gift, and remaining fifteen years in possession, would acquire an adverse title against the donor, and that no stranger could resist its assertion because originating in a gift.

It has been argued also for the same defendant that the plaintiffs show a complete legal title by adverse possession, and therefore want no assistance; but for many reasons it may be important for them to have a legal conveyance. It has been further argued that the plaintiff's right of suit against the defendants Robert B. Hodgson, Duffet and Ruckner, is barred by the Statute of Limitations. I think that these defendants allowing the plaintiff to remain in possession throughout would prevent them claiming anything adverse to her, or resisting this suit, and that defendant Hunter would have no right to such objection. The same defendant has insisted that the title to Duffett and Rucker is not sufficiently traced or described by mesne assignments. No authority has been referred to for that objection; it would apply

only to part of the relief, and has not been presented as a special ground of demurrer.

The bill also prays other relief, as restraining the defendant Hunter and the defendant Mr. Archer, the Registrar of Titles, from bringing the land under the "Transfer of Land Statute." It is not necessary for me now to give any opinion as to the right to the relief. Seeking it does not, I think, make the bill multifarious any more than improperly praying any other injunction or a receiver would. No objection for multifariousness is taken on this ground, or for making the registrar a defendant. The bill may be multifarious as to him objecting, but not as to the defendant Hunter : Attorney-General v. Cradock.[5]

Demurrer overruled with costs ; defendant Hunter to answer within a month.

Solicitors :—Klingender & Charsley—Windsor.

SUPREME COURT, VICTORIA, 1875.] [1 V. L. R. (L.) 150.

STAUNTON v. BROWN.

No. 301, s. 49—Ejectment by registered proprietor—Adverse possession—Onus of proof.

In ejectment by a registered proprietor, the defendant set up a title by possession for fifteen years. He proved an inclosure by him more than fifteen years before action brought, of part of the land sought to be recovered, and subsequent use of part of the land so enclosed. The fence, however, was only of temporary nature, and was removed or destroyed shortly after its erection.

Held, per Fellows, J., that the words "adverse possession" in "The Transfer of Land Statute" (No. 301), Sec. 49, mean possession in fact as ostensible owner (as distinguished from clandestine trespass); and have not the technical meaning put upon them in the old cases ; that a person who has so remained in possession for fifteen years, not being the real owner, acquires an absolute title, ipso facto ; that it is for a jury to determine whether the use relied upon of the land was mere trespass, or was an assertion of a right ; that it lies upon the party who sets up a claim under the Statute of Limitations to prove it ; and that the defendant in ejectment by the registered owner, having started the statute against the plaintiff by showing that the plaintiff has been out of, and the defendant or others in, possession for fifteen years, it then lies upon the plaintiff to show that his title accrued within fifteen years, either

[5] 8 Sim. 466.

to himself or to some person through whom he claims; also, that acts of ownership upon a part of the land may be evidence of possession of the whole.

Per Stephen, J., that mere acts of possession or occupation do not constitute "adverse possession," so as to invalidate a certificate of title; that the defendant must show that such acts were adverse as under the old law; and, that possession of part is not possession of the rest of the property, unless it forms one whole, in fact, or by unity of title.

Per Barry, J., that the plaintiff is entitled to recover any portion of which defendant has not shown actual possession for fifteen years; and,

Per Curiam, that it is for a jury to determine the fact and extent of the possession set up by the defendant.

Ejectment by the registered proprietor under "The Transfer of Land Statute" (No. 301), Sec. 49.

The plaintiff put in his certificate of title, dated 12th October, 1874, and closed his case. The defendant set up a title by adverse possession for fifteen years. The land (in East St. Kilda) was described in the certificate of title as containing one acre twenty-five perches, or thereabouts, "part of portion 155A, parish of Prahran, county of Bourke, and coloured red on the map in the margin." It was bounded on the north by Fulton street, on the east and west by other land belonging to third persons, and on the south partly by land belonging to the defendant, and partly by land belonging to a third person. The defendant proved that, more than fifteen years before the issue of the writ, he erected a brush fence, enclosing part of his land on the south together with a part of the land in dispute, but such fence did not approach within some distance of Fulton street; that he had erected and kept a pigsty upon part of the land near to his own boundary, and within the portion which had been so enclosed; also, that he had removed a tree, and had claimed title to do so against Robinson, the owner of the adjoining land on the west. Robinson claimed title to the land in dispute, and in 1868 erected a fence along Fulton street, forming, with the enclosures of the adjoining allotments, a complete enclosure; and in such fence placed a gate, with a lock, which the defendant broke open. But on cross-examination the defendant admitted that this breaking open was by drawing a hasp, and that he afterwards replaced it. In his rebutting case the

plaintiff put in a conveyance from Robinson to himself, of November, 1873. He also adduced evidence contradictory to that of the defendant, as to the position of the brush fence; and proved that such fence had disappeared entirely, within a few years from the time it was erected.

The learned Judge (Stephen, J.) directed a verdict for the plaintiff, on the ground that it was for the defendant to show when the plaintiff's title first accrued; reserving leave to the defendant to move to enter it for himself, the Court to be at liberty to draw inferences as a jury might. A rule nisi was accordingly obtained on the ground, "That the defendant was not obliged to show either when the plaintiff's title first accrued, or that the defendant turned plaintiff out of possession. That it was sufficient for defendant to show that he had been fifteen years in possession, and that plaintiff had been fifteen years out."

Webb and Box showed cause:—No point of time applicable to this case is fixed by "The Real Property Statute, 1864,"[1] when the period of limitation (fifteen years in this colony) begins to run. The owner is not out of possession, nor is he to be deemed to have discontinued possession, within the meaning of the Statute of [*152] Limitations, merely by the fact that he has not been in tangible occupation of the land; nor does a casual use of it from time to time, by a person who is not the owner, constitute "adverse possession" within "The Transfer of Land Statute" (No. 301), Sec. 49.

The defendant claims possession of the whole allotment, by virtue merely of his occupation of a part. But the possession of the defendant must here be limited to that part only which he actually occupied, or at most to the part originally included within the brush fence erected by him. The defendant did not occupy according to any title or deed showing the boundaries; and the land now sought to be recovered had acquired no name or designation, by reputation or otherwise, to warrant the assumption that possession of a part was

[1] 27 Vic. No. 213, s. 19, corresponding with 3 and 4 W. IV., cap XXVII., s. 3. Sec. 18 corresponds with Sec. 2 of the English Act.

possession of the whole. According to the defendant's own evidence, the plaintiff must be entitled to that part of the land which was not occupied ; then how is the judgment to be apportioned ? The brush fence disappeared long ago, and there is a dispute as to its position. [Stephen, J.—Suppose it were necessary to go behind the certificate of title, and to go into the plaintiff's whole title, who would have to show when the defendant's possession began ?] The defendant would within the principle of Holmes v. Kerrison,[2] an action upon a note payable so many days after sight, in which the defendant was not allowed the benefit of the statute, he not having proved any presentment. It lies upon the defendant to set the statute running. [Fellows, J.—In an action of goods sold and delivered, the plaintiff would have to prove that it was within the period.] It would be a part of his case to show the time of the sale ; but not so in ejectment upon a certificate of title. It does not lie upon the plaintiff to show possession within the time, Weigall v. Blyth.[3] [Stephen, J.—I do not see that "adverse possession" is constituted by mere occupation, which may be permissive ; it must be possession which ousts the owner, hostile to him. Fellows, J.—Mere occupation would be sufficient, Doe d. Will. IV. Roberts.[4] If I believed the evidence of the defendant, that the northern fence was near Fulton street, I should think it evidenced possession of the whole allotment, as being so intended.] But he did not put it up in the [*153] assertion of a right, for admittedly, he had no right or pretence of title at the time. [Fellows, J.—In all the cases, it is a question of fact, and not of intention. Where a certain parcel of land is known by a name, it may be held by possession of a part ; the number on the Government map is its name. [Stephen, J.—In England, conveyances go upon the notoriety of the designation, but here upon admeasurements.] The judgment cannot be apportioned. [Fellows, J.—If the fence has disappeared,

2 2 Taunt. 323.

3 5 A. J. R 106.

4 13 M. & W. 520.

the party to lose, is the one upon whom the onus lies. In Wilby v. Henman,[5] the onus was cast upon the plaintiff, as to the statute. That case, and Holmes v. Kerrison,[6] are reconcilable on the principle that, where the fact lies more within the knowledge of one party than of the other, the burden of proof lies upon the former. In Holmes v. Kerrison, the matter lay equally within the knowledge of both. In Weigall v. Blyth,[7] there was nothing to start the statute, the defendant simply contended that the plaintiff must, in addition to his title, prove possession in himself within fifteen years. Here there is evidence of possession in the defendant, to raise the question.]

The possession of the defendant should have been shown to be adverse. "The Transfer of Land Statute," Sec. 49, makes the certificate of title conclusive, "subject to any rights subsisting under any adverse possession of such land," and the defendant must bring himself within that proviso. The word "adverse" must be taken to have been advisedly introduced, and this revives the old doctrine of non-adverse possession. In the Statute of Limitations, the expression "possession" only is used, and the cases decided on that statute do not apply to the present, where the expression is "adverse possession."

Williams and Hodges in support of the rule :—The defendant has established his position, within Smith v. Lloyd.[8] He has proved that he has been in, and that the plaintiff has been out of, possession for fifteen years. [Fellows, J.—There is no proof here of the facts there stated, to start with. The time, merely, is not sufficient, as it might be co-terminus with a tenancy for life. You [*154] assume that the plaintiff's right accrued at the starting of the fifteen years. Suppose a long lease, and that the lessee had allowed a stranger to hold possession for the last fifteen years of it, the lessor would not be ousted.] The plaintiff would then have to show a constructive

[5] 2 Cr & M. 658.
[6] 2 Taunt. 323.
[7] 5 A. J. R. 106.
[8] 9 Ex. 562.

possession by means of the lease. The presumption is that the plaintiff's right of action accrued before the beginning of the period. [Fellows, J.—As in this action we start with a certificate of title which, of course, does not disclose the history of the title, the defendant must show that the period of his possession fits in with the nature of the plaintiff's title. The statute operates similarly in cases of both real and personal property, as to which latter, Holmes v. Kerrison,[9] applies.] The owner must exercise some right of ownership within the period. The only question is whether fifteen years have elapsed since the right of the plaintiff accrued. The statute has done away with the doctrine of non-adverse possession Nepean v. Doe.[10] [Webb—There it was part of the plaintiff's case to show that the death of M. K. took place within twenty years—that was part of his title.] Culley v. Taylerson,[11] per Denman, C.J.—The title under the certificate is good, only until fifteen years' possession by the defendant has been proved : Murphy v. Michel.[12] "The Transfer of Land Statute" has adopted literally the condition indorsed upon the certificate of title in that case "subject to any rights subsisting under any adverse possession." The plaintiff has himself gone behind his certificate by putting in prior conveyances. By proving that the plaintiff has been out of possession, the defendant has shown a discontinuance of his title, and also that he himself has been in. [Stephen, J.—Is not the Statute of Limitations intended to protect persons having some colour of right ? The absence of the owner does not invalidate his possession in the eye of the law.] A plea of the statute throws the burden of proof upon the plaintiff, as alleging the affirmative : Wilby v. Henman.[13] Sec. 43 of "The Real Property Statute" absolutely extinguishes the title of the owner out of possession during the statutory period : Jones v. Jones,[14] per

[9] 2 Taunt. 323.
[10] 2 M. & W. 911.
[11] 11 A. E. at . 1,015.
[12] 4 W. W. & a'B. L. at pp. 17-18.
[13] 2 Cr. & M. 658.
[14] 16 M. & W. at pp. 710-11.

[*155] Pollock, C.B. In Doe v. Roberts[15] the jury had found that the acts relied upon were mere acts of trespass. [Stephen, J.—Where the title is material, the onus lies upon the plaintiff; but where the entry by the defendant was, at the time, a trespass, the onus lies upon the defendant to show possession for the period. He should show that he put out the owner, or that the latter had notice; mere possession by a trespasser is not sufficient. My view may be illustrated in this way. Suppose that Sir Edward Sugden's view is the correct one, that Sec. 3 of the English statute defines every case; then if a purchaser from the Crown obtained his Crown grant, and never took possession, he could never be barred.] If the owner be absent for fifteen years, and another person occupies, the owner's title becomes extinguished. [Stephen, J.—Does the owner discontinue possession because he never uses the land?] We do not contend that it is always necessary for the plaintiff to show, in the first place, that he has been in possession within fifteen years, but as soon as the defendant shows that he has been in exclusive possession for that period then it lies upon the plaintiff to displace it: Murphy v. Michel.[16] [Stephen, J.—James v. Salter[17] decides that Sec. 3 of the English Act does not comprise every case, and that the question of whether the possession is adverse or not, is not got rid of.] Culley v. Taylerson[18] is the other way. [Fellows, J.—"The Transfer of Land Statute," Sec. 49, gives merely a statutory conveyance, a prima facie title.] Then, upon the facts, if those proved by the defendant are sufficient, he is entitled to a verdict, and plaintiff can bring another action. Even according to the argument of the plaintiff, the defendant is certainly entitled to a new trial. Robinson admitted that he took no action when he found that defendant had broken open the gate, and when he removed the tree.

Cur. adv. vult.

[15] 13 M. & W. 520.
[16] 4 W. W. & a'B. L. at pp. 17-18.
[17] 3 Bing. N. C. 544.
[18] 11 A. & E. at p. 1,015.

The case was at the request of the Court (Barry, J., not having been present during the previous argument)[19] re-argued by [*156] Webb (with him Box) for the plaintiff; and Williams (with him Hodges) for the defendant.

Cur. adv. vult.

Barry, J.—Ejectment—Verdict for the plaintiff, leave being reserved to enter a verdict for the defendant, and the Court being at liberty to draw inferences from the evidence, as a jury might do. This case has occupied our close attention for some time. We have come to the conclusion that there should be a new trial, and each member of the Court has deemed it right to express his own views on the subject.

For my part, I confine myself to observing that, while a reservation of power to draw such inferences is most convenient and conducive to the ends of justice where facts are admitted, or where the evidence is one way, or clearly preponderates, it appears difficult to deal satisfactorily with the case in its present state. The plaintiff seeks to recover possession of an allotment containing one acre and twenty-five perches of land, which for many years after it had been sold by the Crown, was in a state of nature, unenclosed, not known by any name as an estate, manor, hundred, or town land, generally is; but simply designated as part of a Government portion, identified by a number in the usual way.

Murphy v. Michael[20] is an authority that a certificate under "The Transfer of Land Statute" is prima facie evidence of plaintiff's title, and of his right to the possession. Also, that evidence of possession by the defendant of the land in question for fifteen years defeats that prima facie case.

It is, however, for the jury to determine the fact, and the extent of the possession. In many cases the nature of the employment or occupation of the defendant enables a jury to fix that; as, for example, the conclusion

[19] Vide ante, p. 17 n. (a).
[20] 4 W. W. & a'B. L 13.

drawn from the fact of occupation of 640 acres of land—by one person who pastures on it as many sheep, cattle, or horses as it will support, or merely a few of either; by another who cultivates ten acres of it, making no use whatever of the remainder; by another who works a quarry, or burns [*157] brick or lime on a small portion only; by another who traverses a part to get access to a pond on the land, at which he habitually waters his stock; or by another who, as here, builds a stye, to which pigs are confined, or a yard, in which fowls are kept—must be different in each case.

It appears to me that, although the defendant may be entitled to a portion, perhaps to all, of the land enclosed with the brush fence made by him, the plaintiff is entitled to recover possession of some of the land sought to be recovered. But the extent of each area is undefined, and there is nothing by which the boundaries of either can be determined. While these points remain in dispute we are not, as I believe, in a position to decide. The rule will be absolute for a new trial.

Fellows, J.—This was an action of ejectment. The plaintiff put in evidence a certificate of title, and closed his case. The land in question was rectangular, was bounded on the north by Fulton street, and contained little more than an acre.

According to the defendant's evidence, part of the southern boundary was an allotment belonging to the defendant, and the remainder of that boundary was an allotment belonging to some other person. More than fifteen years ago the defendant put up an irregular ring fence of brushwood, and enclosed within it, according to his evidence, part of his own allotment, part of the other southern allotment, and part of the land in dispute. On the last he put up a shed and pigsty, and on his own he erected a house. These were all within the ring fence. The land in dispute was bounded on the east and west by the land of other persons, each of whom afterwards put up a dividing fence between his own land and the land in dispute. The northern boundary, which was outside the ring fence, was unfenced till about three years

ago, when one Robinson put up a fence and gate, which the defendant unfastened by drawing the staple. It also appeared that the defendant had removed a tree from the land in dispute, and that when Robinson claimed compensation, the defendant told him he must prove his title. There was no evidence to show when the title of the plaintiff, or of the person through whom the plaintiff claimed, first accrued.

[*158] Upon these facts, a verdict was directed for the plaintiff, with leave to the defendant to move to enter it for him, the Court being at liberty to draw any inferences which a jury could. As the facts spoken to by the defendant's witnesses were controverted very materially by the plaintiff's witnesses, and as the opinion of the jury was not taken on those facts, the Court is not in a position to draw any inferences, so that the matter resolves itself simply into a question whether there is to be a new trial.

It was contended by the defendant that the burden of proving that the action was brought within the proper time, was on the plaintiff. This the plaintiff denied, and also contended that there was no evidence of "possession" to defeat his title.

Before the 3 & 4 Wm. IV., cap. xxvii., it was necessary that the real owner should have been "disseised," that is, he must have been turned out of his tenure by some person who usurped his place and feudal relation, Taylor v. Horde,[21] and "there must have been an 'adverse' possession for twenty years to give title," per Bayley, J., in Doe v. Clarke.[22] To ascertain whether it was "adverse," inquiry had to be made into the circumstances of the possession, in order to see whether it was, or was not, compatible and consistent with a freehold in the claimant. It depended on the feudal doctrine that the freehold must be, either by right or by wrong, in somebody. The disseisin operated as a transfer, in fact, of the freehold. The disseisor became the wrongful owner

[21] 2 Sm. L. C. (5th Ed.) 495.
[22] 8 B. & C. 720.

of the freehold, while the estate of the disseisee, or rightful owner, was cut down to what the law called a "right of entry," and under certain circumstances, that right of entry might be lost, and the disseisee put to his real action. It was all important, therefore, before the present Act, to see that the possession was adverse. If it were not so, the Statute of Limitations was no defence.

But by the present Act the distinction is abolished; although, as it was pointed out in Nepean v. Doe,[23] it might, and in Doe v. Williams,[24] it actually did, become a question whether the possession was "adverse." That, however, was in consequence of [*159] 3 & 4 Wm. IV. cap. xxvii., Sec. 15, an enactment which has no parallel in our Act. The only inquiry now is as to the fact of possession, and not as to the nature of it. Nepean v. Doe.[25]

It was, however, contended by the plaintiff, that assuming the effect of the Statute of Limitations to be what I have stated, the expression "rights subsisting under any adverse possession," in "The Transfer of Land Statute," Sec. 49, had re-established the abolished doctrine of non-adverse possession. I cannot adopt that construction. The words which are used in that section had been previously inserted in certificates of title and in those instruments they had been held to mean such a possession as is sufficient to entitle the defendant to the benefit of the Statute of Limitations: Murphy v. Michel.[26] The "Transfer of Land Statute" contains nothing to show that it was intended to revive that doctrine. It was passed since that point was decided, and I must therefore suppose that the Legislature was satisfied with the meaning which the Court put upon the words, and used them accordingly, rather than that they intended the old doctrine to apply to lands brought under the Act, and the new doctrine to all other lands. Moreover, it is impossible to construe the word "rights" and the word "adverse" in their ordinary and proper sense,

[23] 2 Sm. L. C. (5th Ed.) 476; 2 M. & W. 910.
[24] 5 A. & E. 291.
[25] 2 Sm. L. C. (5th Ed.) 476; 2 M. & W. 910.
[26] 4 W. W. & a'B. L. 13.

because no "rights" ever did or could "subsist under adverse possession." The effect of the old Statute of Limitations was simply to bar the remedy, and not to destroy the right, which still continued in the true owner, who, if the defective title were afterwards cast upon him, was remitted to his ancient and more certain title. (Co.-Litt., 349.) But under the present Act[27] "rights" do subsist, for by Sec. 43, the old title is extinguished, just as it was formerly by the operation of a fine. I therefore come to the conclusion that the word "adverse" must be read in its popular sense. "The Transfer of Land Statute" is far from technical, and I am of opinion that when the wrong man is in, and the right man is out of possession, the possession is "adverse" within the meaning of that Act.

Is there, then, any evidence of possession? In my opinion there is. Any act done upon the land is admissible—Woolway v. [*160] Rowe[28]—a mere perambulation is such, and a fortiori is the erection of buildings and fences. Nor do I feel pressed with the difficulty of saying to what area these acts of ownership are evidence of title. Cutting down a tree in any part of a wood is evidence of title to the whole, even though it be unenclosed, Jones v. Williams,[29] and, in like manner, working under part of a demised tract of land is evidence of possession of mines under the whole, Taylor v. Parry.[30] Whether land is called by the name of "mountain," "wood," or "allotment" can surely make no difference. "The ownership of one part," says Parke, B., "causes a reasonable inference that the other belongs to the same person, though it by no means follows as a necessary consequence, for different persons may have balks of land in the same enclosure; but this is a fact to be submitted to a jury:" Jones v. Williams supra. The fact of occupation of a manor or an allotment is one thing; the extent of that manor or allotment is another.

[27] "The Real Property Statute 1864," 27 Vic. (No. 213).
[28] 1 A. E. 117.
[29] 2 M. & W. 331.
[30] 1 M. & Gr. 604.

The evidence in this case was proper to be submitted to a jury as proof of the ownership of the allotment in dispute. Whether the acts relied on in any case, were done in the assertion of a right, or were mere acts of trespass, is for the jury to determine. Doe v. Roberts ;[31] though I would observe that the expression, "assertion of right," cannot mean that the defendant supposed he had any right—for confessedly he had none—but it means were the acts done in the same open manner that a rightful owner would have done them, or were they done by stealth, and with a view to prevent detection and discovery ? In the former case they would amount to possession by reason of the supposed acquiescence of the owner, and in the latter they would be nothing more than trespasses.

As regards the question of proof, I think that it lies on the party, whether plaintiff or defendant, who sets up a claim under the Statute of Limitations to prove it, just as he had formerly to prove a disseisin : Williams v. Thomas.[32] Under the old system of transferring land, the question could scarcely have arisen; because the plaintiff, in proving his case, [*161] would almost necessarily have disclosed, by his evidence in chief, the time at which the right to bring action accrued, and the defendant would then have had nothing to do but prove his own possession for fifteen years. This Court has already decided that a party need not prove more than his documentary title, until his opponent has proved that he or others have been in possession for fifteen years, Weigall v. Blyth.[33] The real owner may make an entry at any time within the statutory period (fifteen years in this colony) after another has taken possession, Smith v. Lloyd ;[34] and if he may make an entry, he may of course bring an action, for both remedies are on precisely the same footing ; and in neither case could he show possession within fifteen years, if the land were unoccupied till

[31] 13 M. & W. 533.
[32] 12 East. 154.
[33] 5 A. J. R. 106.
[34] 9 Ex. 562.

such other person entered. If the owner enter when the land is not vacant, and the occupier sue him in trespass, the same question arises as in ejectment, Jones v. Jones ;[35] and if the occupier prove fifteen years' possession, he makes out a prima facie case, and the other party must then prove that the title first accrued, either to himself or some other person through whom he claims, within the period : Austin v. Llewellyn.[36]

This proof is required from him because it lies more in his own than in his adversary's knowledge. "In many cases," says Tindall, C.J., "it would be extremely hard to cast on the lessor of the plaintiff the burthen of showing how the defendant came into possession. The lessor of the plaintiff may have been an infant, or out of the kingdom at the time:" Doe v. Cooke.[37] But if no proof be given by the defendant, by cross-examination or otherwise, that he or others have been in possession for fifteen years, the plaintiff is not called upon to give any explanation. If there had been any plea in this action, it would have contained a negative averment that the action was not brought within fifteen years after the plaintiff's title first accrued ; and, although it has been said by Bayley, J., to be "a general rule that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who [*162] avers the negative," Rex. v. Turner;[38] yet, says Alderson, B., "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the weight of the evidence, but there should be some evidence to start it, in order to cast the onus on the other side," Elkin v. Janson.[39] Therefore, in an action against the proprietor of a theatre for performing dramatic pieces without the consent of the author, the onus of proving such consent lies on the defendant, Mor-

[35] 16 M. & W. 699.

[36] 9 Ex. 276.

[37] 7 Bing. 348.

[38] 5 M. & S. 211.

[39] 13 M. & W. 662.

ton v. Copeland :[40] but he need not give such evidence until the plaintiff has "started it" by proving that the pieces were performed.

So here ; the plaintiff need not prove when his title accrued, until the necessity for such proof is established by evidence on the part of the defendant, that the plaintiff has been out of, and the defendant or some other persons in, possession for fifteen years.

For these reasons I think that the rule should be absolute for a new trial, and that the costs of the first trial should be costs in the cause.

Stephen, J.—The acts relied on to prove "rights subsisting under adverse possession," within the meaning of Sec. 4 of "The Transfer of Land Statute," are certain acts of occupation of portions of the land claimed, viz., the erection of a pigsty and shed in one corner, and of a brush fence enclosing part of the land, together with some land of the defendant, and some other land belonging to an adjoining owner. It appeared to me at the trial that these acts were not, of themselves, any evidence of adverse possession.

The whole question depends upon the meaning of Sec. 49 of "The Transfer of Land Statute," by which "rights subsisting under adverse possession" are saved. Murphy v. Michel [41] was a decision upon a certificate of title containing similar words, which was issued under "The Real Property Act" (No. 140). It may perhaps be conceded that the decision applies to the present Act, and that the words "adverse possession" are to be interpreted with reference to the Act 3 & 4 Wm. IV., cap. xxvii., Secs. 2 and 3.

[*163] But can mere acts of occupation such as I have described, raise a presumption of "rights acquired," so as to invalidate a certificate of title ? Reverting to the old doctrine of adverse possession, it has been described as a possession incompatible with a freehold in the claimant. It appears to me that there is no evidence in this case of such possession. If the defendant's case depend upon

[40] 16 C. B. 517.
[41] 4 W. W. & a'B. L. 13.

Sec. 3 of the Act of Wm. IV., it was, I think, incumbent upon him to prove the necessary facts in order to bring his case within that section. According to James v. Salter,[42] there may be cases within Sec. 2, not within Sec. 3; that is to say, there may be rights acquired by possession, not within the cases enumerated in Sec. 3. But does not mere possession raise any prima facie presumption or rights so acquired? To raise any such presumption the acts of ownership must, as it seems to me, be such as would have been evidence of title under the former law. The nature of such evidence is well illustrated by Doe d. Wm. IV. v. Roberts,[43] in which it was left to the jury "whether they were acts of ownership done in the assertion of a right, or whether they were mere acts of trespass not acquiesced in."

A practical difficulty arises in this case in the application of the evidence. Where possession is taken of one room in a house, or of one corner of a close, that may well amount to a possession of the whole house or close; so possession of part of an estate, or of the waste of a manor, if taken in the assertion of a right, may amount to possession of the entire property; so in cases under Sec. 3 of the Act of Wm. IV. it will be found that generally no such difficulty can arise. But, if the right is to be acquired by mere occupancy of a piece of vacant land, how is the extent of the area affected to be ascertained? In the present case there is no evidence, or presumption, that the owner was, in the eye of the law, out of actual possession of so much of the land as was outside the brush fence. If so, why should not the plaintiff recover that portion of the land, by virtue of his certificate of title; and on whom lies the onus of defining the boundary between these respective portions?

I have thought it right, in a case of so much importance, to state my views, where they differ from those contained in the [*164] judgments of the other members of the Court; but, having regard to the difficult questions of law which are involved in this case, and which have been

[42] 3 Bing. N. C. 544.

[43] 13 M. & W. 533.

so fully considered, I concur in the result arrived at—that there should be a new trial.

Rule absolute for a new trial.

Attorney for plaintiff :—Pavey.
Attorney for defendant :—Anderson & Sandilands.

VICTORIA, 1890.] [12 A. L. T. 49.

GUNN v. LAND MORTGAGE BANK OF VICTORIA (LTD.) AND OTHERS.

Mortgage—Sale—Notice—"Transfer of Land Statute," ss. 84, 105.

A motion under Sec. 84 can be served by sending the same through the post office by a registered letter addressed to the registered proprietor at the address appearing in the register book, although that proprietor be dead. Mortgagees exercising a power of sale are bound to take reasonable means to obtain an adequate price for the land sold ; they are not, however, responsible if, after taking all reasonable means, an inadequate price is obtained.

Action of Francis Gunn and Mary Mackenzie against the Land Mortgage Bank of Victoria (Limited), Walter McCubbin and Robert Buntine. The facts are as follows : The plaintiffs are the executor and executrix of one Ellen Spencer, late of Rosedale, deceased. On the 24th March, 1887, Ellen Spencer borrowed from the defendant bank £250, and gave as security two mortgages over two pieces of land ; the land comprised in one of the mortgages was 149 acres at Rosedale, of which the mortgagor was the registered proprietor under the "Transfer of Land Statute" for an estate in fee simple. The following covenants were contained in the mortgage : (1) The mortgagor to pay to the mortgagee the principal sum of £250 on the 1st April, 1888, and interest thereon in the meantime at the rate of 10 per cent. per annum in half-yearly sums on the 1st of April and 1st October in each year ; (2) 10 days to be the period of time for which the default mentioned in the 84th section of the "Transfer of Land Statute" must continue previously to the service of the notice in the said section mentioned, and 20 days to be the period for which default must continue after the service of the said notice before the power

of sale given by the said 84th section could be exercised; (3) the word mortgagees to include successors and assigns and every covenant with or by the mortgagor to be deemed to extend to and bind her heirs, executors, administrators and as far as may be transferees; the land comprised in the other mortgage was five acres at Vale, of which the mortgagee was owner in fee simple; this land was not under the "Transfer of Land Statute" and the mortgage was in the ordinary form in use under the general law; it contained covenants similar to (1) and (3) above mentioned. Ellen Spencer died on the 11th February, 1888, and probate of her will was granted to the plaintiffs on the 8th March, 1888. It was alleged that the defendant bank had notice of the death of the mortgagor and of the grant of probate to the plaintiffs. Subsequently the bank acting under their power of sale sold the two pieces of land to the other defendants. Notice of intention to sell was given in each case to "Mrs. Ellen Spencer, Rosedale," by registered letter. On the 31st January, 1890, the plaintiffs tendered to the bank £307 5s., the sum due under the mortgages and claimed a release and reconveyance; the bank was unwilling and unable to do so. It was also alleged by the plaintiffs that the bank neglected to obtain from the defendants McCubbin and Buntine a fair and reasonable price for the land when sold. Mr. Box (with him Mr. Power) for the plaintiffs, opened the case.

Mr. Higgins (with him Mr. Topp), for the defendant bank. The plaintiffs claim damages for neglect [*50] to obtain a fair and reasonable price for the land. Defendants have sold under their powers in the two mortgages and got the best price they could. Defendants' only liability is for wilful default in not getting a fair price. Seton on Decrees (4th Ed.), 1066 and 1068. Wilful default is not alleged in the statement of claim. The powers of sale given by Sec. 84 of "Transfer of Land Statute," No. 301, are incorporated by the mortgage under that Act and powers of sale in the mortgage under the "Real Property Act, 1864," are by contract of the parties the same as those under Act 301. The executors of the mortgagor were not registered as proprietors as they

might have been by Sec. 14 of "Administration Act, 1872" therefore the mortgagor though dead remains the "proprietor" (see Sec. 47), and the mortgagee, by addressing a registered letter to her address as appearing on the Register Book, complied with the statute, and though she is dead the notice is sufficient: it is the contract of the parties. When the statute gives rights to the executors it mentions them, Sec. 90. So in the case of the mortgage under "The Real Property Act" the parties have contended that notice of sale may be given by addressing it to the address of the mortgagor appearing in the mortgage. The following cases were cited: Robertson v. Lockie (15 L. J. Ch. 379); Warner v. Jacob (20 C. D. B. 2), 220; Martinson v. Clowes (20 C. D. 857); Voss v. Victorian Permanent Building Society (8 V. L. R. pp. 254 and 273).

Mr. Wood (with him Mr. Power):—If the notices were good we can prove no damages, but if not, we claim as damages the value of the land sold. Secs. 84 and 85 of Act No. 301, are incorporated in the mortgage under that Act. The mortgagee covenants not to exercise the power of sale unless notice be given in one of the three ways pointed out in Sec. 84. By another clause in the mortgages, the rights of the mortgagor are to be extended to executors. Sending a registered letter addressed to a dead mortgagor is not sufficient. The word "proprietor" in third alternative implies a living person, one who can exercise acts of dominion. See Secs. 33, 50 and 64. So in the mortgage under "The Real Property Act, 1864," the mortgagee covenants to give notice of sale to the mortgagor, executors, administrators, and assigns. This is not done if the third alternative is adopted by sending a registered letter to the address of the dead mortgagor as appearing in the mortgage deed. Parkinson v. Hanbury (1 De. and Sm. 143); Major v. Ward (5 Hare, 598); Messer and Gibbs (13 V. L. R. 854), may be distinguished because the object of Act No. 301 is to effectuate title.

His Honour:—The action was brought by the executor and executrix of Mrs. Ellen Spencer against the Land

Mortgage Bank of Victoria, the mortgagees of two pieces of land belonging to Mrs. Spencer. The mortgages were made on the 24th March, 1887. The mortgagor died on the 11th February, 1888. There were two causes of action relied on in the statement of claim, the first being that no notice of the sale of either piece of land was given to the mortgagor, her executors or administrators. The second cause of action was that the defendants neglected to obtain from the purchasers of the mortgaged land a fair and reasonable price for the land. The first cause of action in each case arose upon the instruments of mortgage. One piece of land was situated at Rosedale, and contained 149 acres. It was registered under the "Transfer of Land Statute." The plaintiffs complained that they did not receive from the mortgagees notice of the intention to sell, to which they were entitled under the mortgages, or under the Act, or under both. The mortgage contained a covenant, that every covenant or agreement with the mortgagor should be deemed to extend to her executors. But this mortgage deed contained no covenant of which a breach was alleging in this action inuring to the benefit of the mortgagor, and the benefit of which the executors would be entitled to claim. Substantially, the case was put as a case in which, under the 84th section of the statute, the executors were entitled to claim the same notice which the mortgagor would be entitled to claim ; and although there was no covenant in the mortgage deed to that effect, he thought that the executors would be entitled under the statute itself to receive a notice, or that notice should be given under the statutes in the event of the mortgagee becoming entitled to the rights which the mortgagor (sic) possessed under the statute. Sec. 84 provided that notice of the forfeiture must be given. It applied to both as to service of the notice. It provided that the mortgagee shall be bound to serve on the mortgagor or grantor or his transferees notice in writing to pay the money owing on the mortgage, in one of three ways : First, either by giving notice to the mortgagor himself ; or secondly, by leaving the notice on the mortgaged land ; or thirdly, by sending the notice through

the post-office by a registered letter directed to the then proprietor of the land at his address appearing in the register book. It had been contended by Mr. Wood that this first alternative must be read as if the section contained the words after "him," executors or administrators. He (the Chief Justice) did not think that the construction which must be applied to this section, and indeed to the whole of this Act, supported that view. All the acts which were required to be done under this statute were acts to be done to or by the persons who were entered on the register, or who appeared on some official document in the Titles Office to have the right to have the act done which was the subject in dispute. This section, he thought, pointed especially in reference to the service of notice to that view. Because in the earlier part it required the mortgagee to serve the notice on the mortgagor or his transferee, that is to say, that if the mortgagor had ceased to be the proprietor of his own acts, then he was not entitled to have notice served on him. His transferee must be served. Then in the succeeding part there was no express mention of executors. The language of the latter part of the section taken in connection with the provisions of the subsequent Sec. 105, which enabled an executor on serving an office copy upon the registrar to require his name to be entered as pro [*51] prietor, pointed to the conclusion that an executor was given no rights under the statute until and unless he placed himself on the register in the manner provided by the Act. The words in the latter part of the 84th section appeared to have been framed with the purpose of at once giving the mortgagee a certain means of giving a valid notice, and at the same time securing to the mortgagor, or those who represented him, reasonable means of acquiring knowledge of the service of that notice. There were three alternatives. The notice might be given to the mortgagor himself if he was alive and was present on the spot. That was the simplest and the easiest means of service. But if he was not present, but was absent, or if his residence was not known to the mortgagee, it was proper that the mortgagee should have certain means of giving notice that he might have

means of enforcing his rights under the mortgage. Accordingly it was provided that even although the mortgagor be alive and present it was competent for the mortgagee (and it would be reasonable if the mortgagee did not know of the existence or presence of the mortgagor) to effect service in one or other of two ways, namely, by leaving the notice on the mortgaged land or by sending it through the post-office by a registered letter. I think it is reasonable that the mortgagee should take care that he was in a position to receive a letter addressed to the address appearing in the register book. It was clearly the intention of the Legislature to give the mortgagee the option of taking one of the three methods of effecting a valid service mentioned in Sec. 84. The same observations might be made with little variation as to the mortgage under the general Act. There were two covenants in this mortgage corresponding to one of the covenants under the "Transfer of Land Statute," and providing that the borrower should have certain powers, and that the powers and rights should devolve in his representatives. There was also a provision which he thought ought to be regarded as a covenant which corresponded with the 84th section of the "Transfer of Land Statute," requiring the mortgagee to serve notice of the intention to sell in one of the three ways provided by the statute. Substantially therefore the questions in this case of the two mortgages were similar, and in both the determination rested on similar ground. In both cases the mortgagee was required to serve notice of his intention to sell in one of three ways. The option of adopting one of these three ways, and if he adopted any one of them a valid notice of the intention to sell had been given, and then at the expiration of the proper time he might proceed to sell. In this case the mortgagee had adopted the course of sending a notice to the registered proprietor to the address then appearing in the register book. The executors were not present at that place and had not taken the means of securing that a letter addressed to that place should be sent to them. It was returned to the dead letter office and from that was returned to the mortgagees. But

the fact that the executors did not receive the letter did not make the service invalid. There had been a good deal of evidence of letters and some evidence of conversations, which might be relevant to the question of damages, if damages could be recovered at all by the plaintiffs in this action on their ground of claim. It was contended that notice should be taken by the Court of the conduct of the bank in its dealings with the executors, or, rather, with the solicitor. I do not think that consideration arising upon that evidence could be considered in dealing with the legal rights of the plaintiffs. But I must not be taken to assent to the argument that the bank had acted in a fair and reasonable manner to the executors. The mortgagees knew at an early stage that this was a small estate, and that there were considerable difficulties in its management, and they were appealed to by the executors to stay their hand. The manager of the bank by his silence gave a tacit consent to this application. The subsequent correspondence merely consisted of applications by the manager for payment of interest. These letters were not answered, as they ought to have been, by the solicitor of the plaintiffs. But the failure to answer these letters seemed to be an insufficient reason for the step which was afterwards taken not to insist on payment of the interest, but to sell the property. But he did not think that a want of reasonable and business-like consideration on the part of the defendants could affect in any way their rights. They had the right to give the notice. The defendants' manager, in reply to the reasonable complaint of the plaintiffs, said they had done all they were bound to do. The question was whether they had done all they were bound to do, and in my opinion they have. The second ground of complaint was that the bank had neglected to obtain from the purchasers a reasonable price for land mortgaged to him, and which he had, either by statute, or by mortgage, power to sell. I think the mortgagor had a right to insist upon reasonable means being taken to obtain a fair and reasonable price, and that if a claim were founded upon an allegation of neglect to take fair and reasonable care to obtain an adequate price a good

course of action would be laid, and if it were established by proof, that substantial damages could be obtained. The authorities cited for the defendants do not seem to me to conflict with that view. It might be that a mortgagee was not a trustee. It might be that according to the past practice in equity, a mortgagee might be only liable either for a collusive sale or for wilful default in not taking proper means to obtain an adequate price. It might well be consistent with that, and it might also be that a Court of Equity would not annul the sale on that ground. It might be consistent with all these propositions, that if it were alleged and proved that a mortgagee had neglected to take reasonable and proper care to obtain a fair price, he would be liable in substantial damages for the [*52] injuries inflicted on the mortgagor or his representatives through such neglect. I think this proposition was equally applicable to real property and to personal property, and that a person who had the control (in this case the bank as to one piece of land had only the control, and not the estate), and had an interest and a right to dispose of the property in which another person was interested by way of remainder, or otherwise, a clear neglect to take reasonable means while enforcing his own rights of others who had residuary rights to the same property, might well form the basis of a valid claim for damages. But that was not the cause of action stated here. The cause of action, as stated, was one which could not lie, and even if it did lie, or could be stated in such a form that it could be a good cause of action, the proof did not amount to proof that would justify him in finding that any damages had been sustained. The defendants, whatever might be said of their earlier conduct, seemed to have taken all fair and reasonable means of obtaining an adequate price. They referred the matter to their solicitors, and their solicitors were instructed to place it in the hands of an agent, who acted as valuer. The valuer valued it at a price by no means largely in excess of the price actually obtained. It was said that another valuer had placed a much higher valuation on it. The valuation of Mr. McLean was £587 10s. That was founded upon a valuation made by him

last week. The value by the defendants' valuer was £425. The reserve price was fixed at £400. Strictly speaking that reserve should have been followed, but the circumstances showed that there was a sufficient reason for not following it. The amount actually obtained was £346. But with regard to Mr. McLean's estimate, it must be noticed that the discrepancy between his valuation and the amount actually obtained was not so great as to lead me to the conclusion that the price actually obtained was wholly inadequate or unfair. It was in evidence, and indeed it was so much a matter of common knowledge as almost not to require any evidence, that valuations of real property in this part of Victoria, were most imperfect means of fixing the price of land unless they were founded upon actual sales of land in the vicinity of the land valued and of sales at a period of time not remote from the time at which the land was valued. Such actual sales should be sales of property not sold under circumstances of pressure by the vendor or under circumstances of special excitement influencing the mind of the purchaser. But a mere general estimate not founded upon actual sales was of little practical value. There did not exist here, as in most parts of England, a standard value of land, varying from time to time with the state of the public funds. No such test existed here, and the only other test here was that of actual sale. I cannot therefore say that the valuation of Mr. McLean was so disproportionate from the price obtained as to justify the conclusion that the price obtained was wholly unfair or unreasonable. But even if it were, the damages claimed in this part of the case were claimed on the ground of action which was no cause of action at all. Therefore, on both grounds, I think, the plaintiffs have failed to support their case, and judgment must be entered against them, and with costs. For although the action of the bank towards the plaintiffs had not been such as he thought it ought to have been; yet there had been nothing to complain of in the conduct of the bank either in the sale or in the course of the proceedings. I do not think that the authorities or reason justified the withholding of costs from a successful litigant on the

ground that during the earlier proceedings between the parties they acted inconsiderately or unreasonably. The ordinary consequences must follow in this case and judgment would be entered for the defendants, with costs.

Solicitor for plaintiffs :—Hopkins.

Solicitors for the defendant bank :—Lynch & Co.

VICTORIA, 1872.] [3 V. R. (E.) 143.

McDONALD v. ROWE.

Mortgage—"Transfer of Land Statute" (No. 301), ss. 84, 85 — Default in payment by mortgagor—Notice—Form of—Service—Unregistered letter—Sale by mortgagee—Purchaser holding only a contract of sale.

By a mortgage under the "Transfer of Land Statute" service of the notice contained in Sec. 84 of that Act, in manner therein mentioned, and a further default in payment for seven days, was made a condition precedent to the exercise of the power of sale. Default was made in payment of interest, the principal not being yet due. The mortgagee served on the mortgagor notice that he would exercise the power of sale—"unless the money due under your mortgage be forthwith paid."

Held, that the notice was bad—(1) in not specifying whether payment of interest only, or of principal and interest was required; and Semble (2) in threatening the exercise of the power of sale unless the money was "forthwith" paid.

A notice by unregistered letter, if it be shown to have reached the mortgagor, is sufficient to comply with Sec. 84 of the "Transfer of Land Statute" (No. 301). The provision in that section as to registration of the letter is a precaution to be shown where the mortgagee is unable to prove actual receipt of the letter by the mortgagor.

A person having only a contract of sale by a mortgagee under the "Transfer of Land Statute" (No. 301), is a "purchaser" within Sec. 85 of the Act, which validates contracts of purchase and not merely registered conveyances or transfers.[1]

Motion for an injunction under the "Transfer of Land Statute" (No. 301), Sec. 24, to restrain the defendants dealing with certain land claimed by the plaintiff.

The plaintiff, Farquhar McDonald, being registered proprietor under the "Transfer of Land Statute" of certain lands, mortgaged them on 1st May, 1871, to the defendants Thomas Rowe and James Barwick, to secure

[1] This was afterwards doubted by Molesworth, J., in Ross v. Victorian Permanent Building Society, 8 V. L. R. Eq. at p. 265.

the repayment on 1st May, 1871, of £1,200, with interest at 8 per cent. per annum, payable on 1st November, 1871, and thereafter quarterly. The mortgage was under the Act, and provided amongst other things that in case default should be made in payment of the principal or interest, and such default be continued for seven days, then all the moneys intended to be secured should forthwith become payable and recoverable: and it should be lawful for the mortgagees to serve [*144] on the mortgagor the notice mentioned in Sec. 84 of the "Transfer of Land Statute" by either of the modes mentioned in it, and after such default in payment continuing for the further space of seven days after due service of such notice it should be lawful for the mortgagees to exercise the power of sale, and all other the powers and authorities mentioned in and given by the Act.

Default having been made in payment of interest on 1st November, 1871, and for a further space of seven days after it, the mortgagees entered into possession of the land. On 30th December, 1871, the interest still being unpaid, their solicitor posted, and the plaintiff received, an unregistered letter :—

"Melbourne, 30th December, 1871.

"Mr. Farquhar McDonald.

"Sir :—I am instructed by Messrs. Rowe and Barwick to inform you that unless the money due under your mortgage to them be forthwith paid, they will proceed to put in force the powers given them by that document.

I am, etc., G. Garrard."

The interest remaining unpaid for a further space of seven days the mortgagees sold the land by auction; part to the defendant David Henry, the remainder to a Mr. Peck. The lands sold to Henry were transferred to him by the mortgagees, and he applied to be registered as proprietor of them. The rest of the land had not been transferred to Peck.

The present motion was to restrain the defendant Henry from registering under the provisions of the "Transfer of Land Statute," the transfer from

Rowe and Barwick to him, and to restrain the defendants Rowe and Barwick from transfering the other lands comprised in the mortgage of 1st May, 1871, until they had given notice under Sec. 84 of the Act to the plaintiff.

Mr. a'Beckett for the motion :—The "Transfer of Land Statute" (No. 301), Sec. 84, provides that in case of such a default in payment of interest, as this doubtless was, the mortgagee may serve on the mortgagor notice in writing to pay the money owing either by giving such notice to him, or by leaving it on the mortgaged land, or by sending it through a post-office by a registered letter directed to the proprietor at the address mentioned in the register book. The notice in this case was by an unregistered letter, and was therefore insufficient. Nor would the letter, if registered, have been sufficient, for it did not demand payment, [*145] but was merely a threat of the consequences of non-payment, which McDonald was entitled to disregard, more especially as the letter mentioned as an immediate consequence of non-payment, that which could at all events not have followed for the space of seven days, as provided by the covenant.

Mr. Holroyd for the defendant Barwick :—The provision in Sec. 84 of the "Transfer of Land Statute" as to registered letters is merely to secure the arrival of the notice. If it can be proved that the letter reached its destination that is all that is necessary. It is only where the mortgagee is unable to prove actual receipt that the precaution of registering the letter need be shown.

Mr. Lawes for the defendant Henry :—This defendant has a right to have registered the transfer, for which he has given valuable consideration. He knew nothing of the non-sufficiency of the notice. To be affected by it, notice, or at least knowledge of it, must be brought home to him : Foster v. Hoggart.[2]

The defendant Rowe was absent from the colony.

Mr. a'Beckett in reply.

Cur. adv. vult.

2 15 Q. B. 155.

MR. JUSTICE MOLESWORTH :—

This case comes before me on a motion for injunction to restrain the defendant Mr. Henry from registering, under the provisions of the Act No. 301, the transfer from the defendants Messrs. Rowe and Barwick to him of allotment 2, Sec. 96, part of allotment 1, Sec. 97, and part of allotment 7, Sec. 94 ; and to restrain the defendants Rowe and Barwick from transferring the other lands comprised in a mortgage of 1st May, 1871, until they shall have given notice to the plaintiff, Mr. McDonald, under the Act No. 301, Sec. 84.

The mortgage in question was made, as under the Act, by McDonald to Rowe and Barwick to secure £1,200 payable 1st May, 1873, and half-year's interest payable 1st November, 1871, with subsequent interest [*146] quarterly. It provided, amongst other things, that in case default should be made in payment of the principal or interest, and such default be continued for seven days, or in the observance of any covenant, then all the moneys intended to be secured should forthwith become payable and recoverable ; and it should be lawful for the mortgagees to serve on the mortgagor the notice mentioned in the 84th section of the Act, by either of the modes mentioned in it; and after such default in payment continuing for the further space of seven days after due service of such notice, it should be lawful for the mortgagee to exercise the power of sale and all the other powers and authorities mentioned and given by the Act.

On 30th December, 1871, a half-year's interest, due 1st November, remaining unpaid, Mr. Garrard, authorized by the mortgagees, sent a letter to the plaintiff by post, not registered, which was duly received. [His Honour read the letter ut supra, p. 144.] The debt remaining unpaid, the mortgagees sold by auction part of the land to the defendant Henry under, I assume, a contract regular between ordinary seller and buyer, who paid part cash, part bills ; and other part to another purchaser, Mr. Peck. There are various objections to this notice and the service of it.

Upon default in payment of interest the mortgagees had an option of requiring payment of both principal and interest, or interest only, and the exercise of that option in the former way would entitle the plaintiff to pay both. I think the notice was defective in not distinctly exercising the option. I rather think the mortgagees' power might be exercised by an agent, and that the agency was sufficiently asserted. The letter is not a demand of payment, but a threat of the consequences of non-payment; and that vague, referring indistinctly to several powers given by the Act, and untruly, as threatening consequences of not paying "forthwith," whereas the consequences would follow seven days' neglect. Upon these grounds I am inclined to think the notice ineffectual, though the last may be met by Metters v. Brown.[3]

As to the manner of sending the notice, I rather think the words in Sec. 84, "giving such notice to him," are satisfied when the notice in fact reaches the mortgagor. There is no reason that a postman carrying an unregistered letter should not be as effectual as a private messenger. [*147] The provision as to registered letters, I think, means that this precaution, beyond mere posting, must be shown where the mortgagee is unable to prove actual receipt. For the reasons above noticed I think the motion should succeed as against the mortgagees.

But the defendant Henry appears as a purchaser for valuable consideration without notice at the time of entering into his contract. The 85th section appears to me to validate contracts, not merely conveyances or transfers, when registered under the Act, and to protect contractors knowing nothing to impugn the propriety of the sale when contracting. Forster v. Hoggart[4] decided that a purchaser taking a contract for title as under a mortgage power, where notice should have been given and was not, might rely as against the mortgagee upon the objection, notwithstanding a clause that he was not bound to enquire. Here the mortgagor is seeking relief against Henry resisting. As to the other purchaser, he

[3] 9 Jur. N 5, 958

[4] 15 Q. B 155.

is not a party, and I am not to anticipate the case which he may wish or be able to make. I feel much doubt as to these opinions.

Motion refused as to defendant David Henry. Order that defendants Thomas Rowe and James Barwick be restrained from transferring the other lands (describe from mortgage) or any part thereof, as on a sale thereof as mortgagees, until after they shall have given notice to the plaintiff, as by Sec. 84 of the "Transfer of Land Statute" provided. Reserve costs.

Solicitors :—Jennings & Coote—Bennett & Attenborough.

VICTORIA, 1871.] [2 V. R. (L.) 113.

IN THE MATTER OF "THE TRANSFER OF LAND STATUTE,"
IN THE MATTER OF CHARLES SALTER.

Mortgage—Trustee—Power to sell or mortgage—Power of sale—"Transfer of Land Statute" (No. 301), ss. 19 and 32.

A trustee having power to sell or mortgage, executed a mortgage containing a power of sale in case of default of payment upon one month's notice. Upon an application by the purchaser under the power of sale to bring the land under the "Transfer of Land Statute," the Commissioner of Titles refused to register the land.

Held, that this was a case for an additional indemnity to the guarantee fund under Sec. 32; but that the transfer should be registered on such indemnity as might be required by the commissioner being given.

Summons to the Registrar of Titles to uphold the grounds of his refusal to bring certain land under the "Transfer of Land Statute."

The case as stated and signed by the Commissioner of Titles was as follows :—

1. On the 23rd of April, 1863, a piece of freehold land, part of Crown allotment 5, of Sec. 3, parish of Bungaree, county of Grenville, was vested in trustees upon trust for Harriet Jackson for life, for her separate use, and after the death of her husband, William Jack

son, for life, with remainder to their children, as they or their survivor should appoint, and in default of appointment to the children, equally with an ultimate remainder to William Jackson in fee. [*144]

2. The conveyance of such land contains the following agreement and declaration :—"That the said trustees or the survivor, or other the trustees or trustee acting in the execution of the trusts hereby reposed, may at any time during the joint lives of the said William Jackson and Harriet Jackson with their consent in writing, or during the life of the survivor of them with his or her consent in writing, sell and absolutely dispose of the said trust estate, lands, hereditaments and premises hereby granted and released with their appurtenances to any person or persons whomsoever for the best price or prices which may be reasonably had or gotten for the same. And also to raise any sum or sums of money by way of mortgage of the same lands and hereditaments and premises, and to receive the purchase or mortgage moneys to arise therefrom and good valid receipts, releases and discharges to give to the person or persons paying the same, and to execute all necessary releases, conveyances, mortgages and assurances to the purchaser or purchasers, mortgagee or mortgagees thereof which may be required. And upon trust to stand and be possessed of the moneys to arise from the sale or mortgage of the said lands, hereditaments and premises for the sole and separate use and benefit of the said Harriet Jackson and William Jackson, or the survivor of them and their issue upon the trusts hereof, with power to invest same in the purchase or mortgage of freehold lands in the colony of Victoria, or in such other manner as the said trustees or the survivor of them, their or his heirs, appointees or assigns shall deem fit and advisable."

3. On the 18th day of May, 1864, Messrs. Walsh and Hitchens, the then trustees, at the request of Mr. and Mrs. Jackson, who were parties to and executed the deed, mortgaged the land to Issac George to secure the repayment of £200 then lent by him on the 18th day of May, 1866, with interest in the meantime at the rate of £2 10s.

per cent., payable half-yearly. In the mortgage deed a power of sale was given to the mortgagee if default was made in payment at the end of one month after notice in writing to the trustees of any intention to exercise such power.

4. On the 17th of December, 1870, Isaac George, having previously given a month's notice, sold the land under his power of sale to Chas. Salter, of Ballarat, for £216 3s., and the latter had applied to bring the land under the operation of the "Transfer of Land Statute."

5. Direction has been given not to register the land, and in compliance with a requisition in this behalf, and pursuant to the 135th section of the "Transfer of Land Statute," the following are stated as the grounds upon which such direction was given :—(1) That in the present state of the reported cases, it is not expedient that the colony should become the guarantor of a title circumstanced as the applicant's is. (2) That a power of sale exercisable after only one month's notice was not authorised to be given by the trustees, Messrs. Walsh and Hitchens, to the mortgagee, Isaac George.

The Supreme Court is referred to the following cases : Clarke v. Royal Panopticon,[1] Bridges v. Longman,[2] Re Chawner,[3] an English decision after the passing of the 23 & 24 Vic. cap. cxlv., the section of which, mentioning six months, was adopted in Victoria on the 2nd June, 1864 (being after the date of George's mortgage), 3 Vic. Stat. p. 476, Sec. 161, of Act No. 213 ; Stodart v. Stodart.[4] It is believed that the Master in Equity in this case approved of a power of sale being inserted after a three months' notice. [*115].

a'Beckett for the registrar :—In the first case, Clarke v. The Royal Panopticon,[5] it was held by Vice-Chancellor Kindersley that a power of sale was not incident to a mortgage ; and where shareholders having power to

[1] 4 Drew. 26 ; 3 Jur. N. S. 178.
[2] 24 Beav. 27.
[3] 38 L J Ch. 726.
[4] 6 W. W. & a'B. Eq. 59.
[5] 4 Drew. 26.

authorise a sale or mortgage authorised a mortgage it was held that the trustees could not give the power to sell. This was, however, not followed in Bridges v. Longman[6] nor in Cook v. Dawson.[7] Subsequently to these decisions an Act was passed in England, 24 & 25 Vic. cap. cxlv., adopted by the "Real Property Statute," No. 213, giving the power of sale as incidental to a mortgage, provided six months' notice was given ; and after that statute a decision was pronounced by Vice-Chancellor Malins, in Re Chawner's Trusts,[8] recognising the power to sell on six months' notice. In Stodart v. Stodart,[9] Mr. Justice Molesworth sanctioned money being raised on mortgage with a power of sale, and the Master allowed such a power on three months' notice. Here the mortgage was altogether outside the statute, and therefore the provisions of Secs. 159 and 160 of No. 213 could not be considered as aiding the mortgagee's power.

J. W. Stephen for the applicant :—The Commissioner of Titles, in administering his department, is not to legislate but only to carry out the "Transfer of Land Statute." That Act directs him to bring land under the Act unless there are conflicting titles. What conflicting title is there here ? At the most, there is a doubtful chance of an equity suit, which nobody would ever think of instituting. The applicant has at least a good holding title. The commissioner does not go so far as to refuse the title on the ground that there was no right to give the power to sell, but apparently chiefly because the notice was too short. Clarke v. Royal Panopticon is distinguishable from the present case, as there the trustees had no power to authorise a sale at all, and it does not appear to be followed in the later cases. If there was power to sell, the length of the notice was immaterial. Six months' notice is the rule in England, but one month here in such matters is equal to six in England. Under Secs. 19 and 23 of the "Transfer of Land Statute" the commissioner has no power to reject the title, but at

[6] 24 Beav. 27.
[7] 29 Beav. 123.
[8] L. R. 8 Eq. 569.
[9] 6 W. W & a'B. Eq. 60.

the outside can only demand a larger indemnity from the insurance fund.

[*116] a'Beckett in reply :—The commissioner can not bring land under the Act until all encumbrances are released, and the definition of encumbrances in Sec. 4 is sufficiently large to cover this case. The applicant's argument amounts to saying that the commissioner is bound to register the title of anyone who has the legal estate, no matter how doubtful it may be ; whereas the true argument is that the commissioner can take the same objections that any purchaser can.

Cur. adv. vult.

Stawell, C.J.—Summons calling upon the Registrar of Titles to substantiate the grounds of his objection to the registering of this title. The objection is that a power of sale upon a month's notice is contained in the mortgage deed, the mortgagors being trustees only, with a power of sale or mortgage. The "Real Property Act," Sec. 59—which is a transcript of the English Act 23 & 24 Vic. cap. clxv. sec. 11—provides for the sale by any mortgagee after interest is in arrear for six months, but does not prescribe the notice to be given of the mortgagee's intention to sell. In England the notice usually is six months ; in this country, it was stated during the argument that the notice is usually one month. The land was sold after notice of one month only, and the present application is by the purchaser under that sale to have himself registered as proprietor of the land. The registrar refused to register for the reason that in the present state of the reported cases it is not expedient that the colony should become the guarantor of a title circumstanced as the applicant's is. We are disposed in one sense to concur with the objection, for we think this is a case in which the registrar might exercise the powers conferred upon him by Sec. 32 of the "Transfer of Land Statute." That section provides that "the commissioner may require an additional indemnity, if he thinks proper, against any uncertain or doubtful claim or demand arising on the title." Apart from the exercise of

this discretion, we think the objection has not been substantiated. It is not an objection that can be maintained at law, and the probability of its being sustained in equity depends on whether the land was sold at an undervalue, or whether there was any irregularity that has not been disclosed. We think, however, that it comes within the words "uncertain claim or demand," and that it is just a case in which the Legislature has empowered the registrar to prevent the guarantee fund being saddled with the risk of an uncertain title being [*117] registered. It may be registered, and the commissioner may exercise the discretion vested in him by Sec. 32. We think the commissioner has grounds for his objection, and therefore refuse the certificate preventing his getting costs.

Certificate to issue on applicant giving such indemnity as may be required by the Commissioner of Titles.

Attorneys for applicant :—Holmes & Salter.

Attorney for the Commissioner :—Gurner, Crown Solicitor.

VICTORIA, 1875.] [1 V. L. R. (L) 319.

IN RE CAVEAT OF J. B. SLACK, AND THE APPLICATION OF W. H. WINDER,

AND

"THE TRANSFER OF LAND STATUTE."

"The Transfer of Land Statute" (No. 301), s. 116—Service at place named in caveat.

A rule nisi to remove a caveat is not properly served upon the caveator by leaving it at the address named in the caveat at a time when no person is present at such address to receive it.

If the affidavit of service disclose such mode of service, instead of stating, in the usual form, that service was effected, it is unnecessary for the caveator, in moving to rescind such a rule, to make a counter affidavit that the rule nisi never reached him or came to his knowledge.

Held, also—Barry, J., dissenting—that an admission by the caveator, that the rule nisi did reach him two days before it was made absolute, would not cure the defective affidavit of service, or prevent the Court from rescinding the rule.

Rule nisi to rescind a rule of Court.

The rule sought to be rescinded was a rule of September 17, 1875, directing the removal of a caveat lodged by Slack under the "Transfer of Land Statute" (No. 301). The ground was that the rule nisi, dated September 11, had not been served upon him or upon any person authorised to receive service on his behalf, or in accordance with the statute. In the caveat, the caveator appointed "No. 78 Queen street, in the City of Melbourne, as the place at which notices and proceedings hereto may be served." The service of the rule nisi of September 11 was by putting a copy thereof, and of the affidavits, under the door at the address named, on Saturday afternoon at 2.30 p.m., after the premises were closed, and no answer was obtained to repeated knocking at the door. The person who so left the rule nisi called at the same address on the morning of the following Monday, September 13, and ascertained from the occupier that the documents had been received. The rule nisi was returnable on September 15, but was not called on till September 16.

In the affidavit in support of the present rule, the caveator stated that he did not receive the copy of the rule nisi till September 14.

Box showed cause :—As the caveator merely named an address, in accordance with Sec. 116 of the Act No. 301, at which notices, etc., were to be served, personal service is not necessary. [*320] Such service as that effected has been held good: Burdett v. Lewis.[1] The caveator admits having received the documents the day before the rule was returnable, and he had ample time to show cause. It as not necessary that he should have four days' notice. If necessary, he might have applied for an enlargement of the time. He has not applied promptly on the first day of the term. If the caveator merely name a place for service, it is his business to watch for the service of notices, etc. The provision of Sec. 116 may be regarded as a statutory substituted service.

[1] 7 C. B. (N. S.) 791.

Hood in support of the rule :—This enactment does not apply to the service of rules of the Court. But service must mean service upon some person, not the mere leaving at a place, unless so enacted. The affidavit of service upon which the rule was made absolute did not inform the Court that there was no person at the place when the documents were left there. Though service upon an attorney in a cause need not be upon him personally, it must be upon some person, Braham v. Sawyer.[2]

Cur. adv. vult.

The Court differing in opinion, the judgment of the majority (Fellows, J., and Stephen, J.) was delivered by Stephen, J.

In this case a caveat had been lodged under "The Transfer of Land Statute," Sec. 22, and an address or place "at which notices and proceedings relating to such caveat may be served" had been duly given. William Henden Winder summoned the caveator, J. B. Slack, by rule nisi, to attend before this Court to show cause why the caveat should not be removed ; and that rule was made absolute, on an affidavit that it had been served on Slack, "by leaving a true copy at the office of Hugh Peck," being the place mentioned in the caveat as the place where notices and proceedings relating to the caveat were to be served.

An application having been made to rescind that rule, on the ground of the insufficiency of the affidavit of service, it was contended, on behalf of Winder, that,—as it now appeared by affidavit that the rule nisi to remove the caveat actually [*321] reached the caveator's hands before it was returnable, and as the caveator was actually in Court when it was called on for argument,—the defective affidavit was in effect cured, and he was therefore not now in a position to ask that the rule absolute should be rescinded, and Burdett v. Lewis[3] was relied upon.

If the affidavit of service had contained any such statement as Erle, C.J., in that case said would be suffi-

2 1 Dowl. & L. 466.
3 7 C. B. (N. S.) 791.

cient, it would not have been open to the objection now made; and the fact that it does not contain any such statement, sufficiently distinguishes it from the form there suggested.

A document not requiring personal service is not properly served on a person by leaving it with "the landlord at the residence of the defendant," Griffin v. Gilbert,[4] or by delivering it "to the housekeeper at the residence of the defendant," where several others also reside at the same place: Lewis v. Blurton;[5] nor will it do to put a notice into any ordinary slit in a door, marked "letters:" Braham v. Sawyer;[6] and a fortiori, it will not do, as was done in the present case, to leave at the place, no person being there to receive it: Chaffers v. Glover.[7]

It is sometimes necessary for a person who seeks to set aside proceedings for want of service to swear that the process never came to his knowledge: Giles v. Hemming.[8] The reason of that rule is explained by Alderson, B., in Phillips v. Ensell,[9] viz., that it must be presumed, where the contrary does not appear, that the affidavit of personal service was in the usual form, and, as "there is a pristine affidavit of service," the defendant must swear he did not get the writ, because an ambiguity is involved in the term "personal service:" Rhodes v. Innes.[10]

Where, therefore, the affidavit of service is in the usual and proper form, a counter affidavit must deny all knowledge of the writ. But where, as here, the affidavit of service is not in the usual form, no counter affidavit is required as the vice [*322] of the affidavit is self-evident and alone forms the ground of applying to rescind the rule. The only inquiry is whether the rule was right under the circumstances in which it was made; and that depends on whether the affidavit was sufficient to justify the rule.

[4] 7 C. B. 101.
[5] 7 C B 102.
[6] 1 Dowl. & L. 466.
[7] 5 Dowl. 81.
[8] 6 Dowl. 325.
[9] 2 Dowl. 686.
[10] 7 Bing. 329.

In judging whether that rule was properly made, the Court cannot look at any other affidavit than those which were before the Court when it granted the rule. "I am quite clear," says Patterson, J., "that no new affidavit of collateral matter can be received for the purpose of rescinding the order, either to show that no cause of action existed, or that the defendant was not about to quit the country:" Bullock v. Jenkins.[11]

It is a rule, too important and well established to permit of the least infraction, that no man is to be condemned, punished, or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard; and a Court cannot be satisfied that such opportunity has been afforded, unless it clearly sees that there has been a proper service of the process requiring appearances.

The language of "The Transfer of Land Statute," already quoted, is stronger than that of "The Common Law Procedure Statute, 1865," No. 274, Sec. 413; so that the practice under the former cannot be allowed to be less strict than under the latter.

The rule ought not to have been made absolute on the affidavit now objected to. It was so made absolute, improvidè and, in order to uphold a very important rule of practice, it must now be rescinded with costs.

Barry, J.—Impressed as I am with the importance of a strict enforcement of the performance of their duty by those who undertake the service of process and of notices, and concurring as I do fully in the reasoning of my learned brethren, as expressed in their judgment, I regret to find myself compelled to differ from the result at which they have arrived, because, with deference to them, they have not, in my opinion, given to the affidavit of Joseph Bragg Slack, sworn on the 22nd September, 1875, the weight to which it is entitled.

[*323] In setting aside proceedings for irregularity of service of an instrument of any kind, it is necessary that the Court should be satisfied that the instrument, or the

[11] 1 L. M. & P. 651.

fact of the attempted service, did not come to the knowledge of the party.

That is a proposition which does not require the citation of any of the numerous cases in the class by which it is supported. In the commercial cases, in which arise analogous questions as to the dishonour of bills of exchange, and in other instances where proof of notice is a condition precedent to the recovery for breach of contract, the like rule prevails.

Gair, in his affidavit, swears that, on Saturday, the 11th of September, he served the rule in question on a house in which no person then was ; a house named by Slack as the place where papers were to be served on him, and that he put it under the door ; that on the following 13th of the same month he called at the same place, and was informed by Hugh Peck that he had received the copies of the rule and affidavits, which he produced ; and Slack, in his affidavit, swears that they were delivered to him by Peck on the 14th.

There is no negative oath that he had no knowledge that these papers had been properly served, or that they had not reached the hands of Peck, who was named by him as the person on whom service was to be made. I agree that such an affidavit is, under the circumstances of this case, not required. However, I cannot conceal from myself that there is here an affirmative oath of Slack that the papers did reach Peck, and were delivered by Peck to him ; and, with this knowledge, it was, as I conceive, his duty to have appeared in Court, and shown such cause as he could.

It is, in my opinion, a case in which the observance of salutary strictness of proof of due service is relaxed by the act of the party himself.

Rule absolute.

Attorney for the applicant :—Sievewright.

Attorneys for the respondent :—Macgregor, Ramsay & Brahe.

VICTORIA, 1871.] [2 V. R. (L.) 10.

IN THE MATTER OF THE "TRANSFER OF LAND STATUTE," EX PARTE DONALD MUNRO ROSS.

No. 301, s. 135—19 Vic. No. 19, s. 176—Fi. fa.—Sale of land—Advertisement.

Land under the "Transfer of Land Statute" was levied on under a fi. fa. The sheriff advertised in the local newspaper of the 1st December, 1870, an intention to sell on the 3rd January, 1871, and in the Government Gazette of the 9th December, 1870, an intention to sell on the 10th January, 1871. The sheriff sold on the 10th, and on the 31st January executed a transfer to the purchaser.

Held, that substantially there had been a compliance with the Act, 19 Vic. No. 19, s. 176, and application to compel the Registrar-General to register the transfer granted, but without depriving him of his costs.

Summons under the "Transfer of Land Statute," Sec. 135; calling upon the Registrar-General to shew cause why Ross should not be registered as the owner of land near Belfast. The reasons given for not registering the applicant were as follows :—

"George Nalder was, on the 24th November, 1870, the registered proprietor of freehold land, Crown allotment 1, of Sec. 1, parish of Woorndoo, county of Hampden. On that day a copy of a writ of fi. fa. against him, at the suit of Martin and others, was served on the Registrar of Titles, accompanied by a statement, as required by Sec. 106 of the 'Transfer of Land Statute,' specifying such Crown allotment as the land sought to be affected by such writ, and the usual entry was thereupon made in the register book. On the 31st January, 1871, a written transfer, dated the 10th day of the same month by the sheriff of the Belfast circuit district, to Duncan Munro Ross, of all Nalder's estate in such land, was presented for registration, which transfer purports to be on a sale under the said writ, in consideration of £51. A sale of the land was advertised in the Government Gazette of the 9th December, 1870, to take [*11] place at the Caledonian Hotel, Belfast, on 10th January, 1871, and

was also advertised in the Belfast Gazette of the 1st December, 1870, a newspaper circulating in the neighbourhood of the land, to take place at the same hotel on 3rd January, 1871. The transfer to Ross has been refused to be registered ; and in compliance with a requisition on this behalf, and pursuant to the 135th section of the 'Transfer of Land Statute,' the following is stated as the ground of such refusal :—That the sale, not having been duly advertised, is void ; 19 Vic. No. 19, Sec. 176 : Beavan v. Chadwick.[1]

"J. Carter, Commissioner of Titles."

T. a'Beckett for the registrar :—The proper advertiseing of a sale of land is a condition preliminary to the sale, and the land must be properly sold before the registrar can recognize a transfer by the sheriff. The transfer itself is not conclusive evidence that everything done prior to it was regular. [Stawell, C.J.—The month's notice of sale required by the Act is only to prevent a hasty sale.] The Act requires the notice to be given in two newspapers. Here it is only given in one, because the notice in the Belfast Gazette was not correct, it mentioning the sale as on the 3rd January, whereas it did not take place till the 10th. In Beaven v. Chadwick,[1] a sale took place after due notice, but the bailiff was beguiled from the place by the purchaser, who refused to complete the transaction, and the bailiff held a fresh sale the same day to another person. The Court was then of opinion that the second sale was regular, but here no sufficient notice was given at all.

Higinbotham for the applicant :—The Act requiring notice to be given in two papers is directory only, not mandatory. All the registrar has to look to is the transfer from the sheriff. If the transferee could maintain ejectment on that transfer, he is entitled to be registered as the owner of the legal estate : Dreverman v. Doherty,[2] White v. Bannister,[3] Jacomb v. Goldsmith.[4]

Cur. adv. vult.

[1] 3 W. W. & a'B. L. 127.
[2] Victorian Reports, Vol. 1 ,Eq. 4.
[3] Sup. Ct. Vic. Sept. 21, 1858.
[4] Sup. Ct. Vic. July 3, 1861.

Stawell, C.J.—Summons to the Registrar-General to shew cause why Ross should not be registered as the owner of land. The land was brought under the statute. It was levied on, and notice of intention to sell by the sheriff was given, but an error crept into the advertisements. In the local newspaper the notice was of an intention to sell on [*12] the 3rd January; in the Gazette the notice was for a sale on the 10th January. The month required by the Act expired on the 10th and not on the 3rd. The sale took place on the 10th. The land was purchased by Ross, and the usual bill of sale executed by the sheriff, and possession taken. The Commissioner of Titles declined to register this transfer on the ground that the publication of the time and place of sale in the local newspapers was not conformable to the Act. We had occasion to consider this question in a case of ejectment: Beavan v. Chadwick.[5] We then held that the object of the Act in directing advertisements was not so much to obtain competition and a fair amount at the sale, as to insure a reasonable time intervening between the first notice of sale and the actual sale, so as to prevent one person's land being seized and sold for the debt of another, and we are still of the same opinion. We think in the present case, it is only applying the same principle which we then laid down, to say that substantially there has been a compliance with the Act. The sale took place after the expiration of a month from the notice, and if we were to read the Act as rigidly as the Commissioner of Titles conceives it ought to be, we were wrong in Beavan v. Chadwick. Although it is the duty of the commissioner to take these objections, we think this is untenable, and the transfer should be accepted. The case stands in a different position from most others brought before us in this way. No other questions or points can arise. It is not as if we were asked to compel the commissioner to bring the land under the statute, the land is already within the statute; and the reasons we have referred to in other cases which lead us to hesitate before we

[5] 3 W. W. & a'B. L. 127.

compel the commissioner to accept a title do not exist in this. We, therefore, grant the application. But we think, as far as the commissioner is concerned, he only exercised a proper vigilance, and therefore we decline to give any certificate to deprive him of his costs. We offer no opinion as to whether the proviso is mandatory or directory; our judgment of course assumes it to be mandatory.

Attorney for the Registrar:—Gurner, Crown Solicitor.

Attorney for the applicant:—Farmer.

VICTORIA, 1880.] [6 V. L. R. (L.) 458.

IN RE "THE TRANSFER OF LAND STATUTE" EX PARTE BOND.

"Transfer of Land Statute" (No. 301), s. 106—Transfer under several writs of fi. fa.—Duty of Registrar to decide on validity —"The Land Act, 1869," ss. 20, 110—Lease—Condition against assignment—Regulations—Ultra vires.

The judicial duty of examining into the validity of instruments presented to the Registrar of Titles for registration is imposed upon him by the "Transfer of Land Statute."

Under Sec. 106 of the "Transfer of Land Statute," it is the duty of the Registrar of Titles to register the first transfer under a sale from the sheriff which is lodged with him, if it be valid; if it appear not to comply with a condition in the instrument of title, he must decide for himself whether such condition is valid.

Under "The Land Act, 1869," Sec. 110, no power is given to make a regulation for the insertion, in leases under Sec. 110, of a condition prohibiting assignment of the lease; such condition, if inserted, is ineffectual.

Summons to the Registrar of Titles, to substantiate and uphold the grounds of his refusal to register John Bond as proprietor of certain land. The statement of the registrar was that one Godfrey was registered proprietor of a lease dated 1st December, 1879, from the Crown to him, his executors, administrators and approved assigns, for seven years, which lease contained the following clause:—

"Provided further, and these presents are upon this express condition, that no assignment or transfer, whether

by operation of law or otherwise, of these presents or other instrument affecting the premises hereby demised, shall have any effect or validity whatsoever unless and until the Governor, acting by and with the advice of the Executive Council, sanction the same, and further until the same be registered in the office of Crown Lands; and all such instruments as aforesaid shall have and take priority not according to their respective dates, but according to the priority of the registration thereof."

On 22nd March, 1880, a copy writ of fi. fa. against the lessee, at the suit of the Colonial Bank, accompanied by a statement specifying this lease as sought to be affected, was served upon the Registrar of Titles, and by him duly entered as required by the "Transfer of Land Statute" (No. 301), Sec. 106. On 15th April, a copy fi. fa. against the lessee, at the suit of Bond, similiarly accompanied, was served upon the registrar, and entered. On 6th May, a transfer from the sheriff, in pursuance of the fi. fa. of the bank, was lodged for registration and registered. On 10th May, a transfer from the sheriff to Bond, in pursuance [*459] of his fi. fa., was lodged with the registrar, who refused to register it. The grounds of the registrar's refusal were: (1) That it is the duty of the Registrar of Titles to register instruments in the order in which they are lodged with him for registration. (2) That the special clause in the lease referred to does not relate to or affect the registration of instruments under the "Transfer of Land Statute."

An affidavit, filed on behalf of the applicant, Bond, stated that, in the year 1879, Bond recovered judgment against Godfrey for £600, and issued execution on 18th November of that year. On 4th April, 1880, Bond obtained the necessary sanction of the Governor-in-Council to the registration of his fi. fa. at the Crown Lands office, and this sanction was endorsed upon the copy writ lodged by him with the registrar on 15th April. On 6th April, the sheriff sold under Bond's writ. On 27th April, Bond obtained the sanction of the Governor-in-Council to registration of a transfer under the sale in pursuance of that writ, and such sanction was endorsed upon the

transfer lodged by him on 10th May. The sale under the bank's fi. fa. was on 13th April, and the sanction of the Governor-in-Council to registration of such writ at the Crown Lands office was obtained on 20th April—the sanction to the transfer under the sale in pursuance of such writ being obtained on 25th May.[1]

Holroyd, Q.C., for the registrar :—Under Sec. 106, the transfer first registered takes the title, the land then no longer remains registered in the name of the execution debtor. The second transfer could not be registered for any purpose ; it would be con [*460] trary to the whole policy of the Act to have two transferees registered at the same time in respect of the same land : Registrar of Titles v. Paterson (2 App. Cas. 110 ; 46 L. J. (P.C.) 21).

[Stawell, C.J.—The complaint is that the present applicant is, by the refusal of the registrar, completely precluded from contesting the question before any competent Court.] Secs. 144-6 prevent any injustice resulting ; they provide for compensation to any one who is shut out of his rights. The registrar has nothing to do with the proviso in the lease ; that is entirely inter partes, between the landlord and tenant, and is, moreover, invalid. Landlord and tenant cannot make a valid direct covenant that there shall be no assignment without sanction during the term ; though a covenant may be framed to accomplish the object, by forfeiting the

[1] The following table shows the dates of all the various dealings, in chronological order :—

22nd March —Copy Bank's fi. fa. lodged with Registrar.

4th April—Sanction of Governor-in-Council to registration of Bank's fi. fa.

6th April—Sheriff sold under Bond's fi. fa.

13th April—Sheriff sold under Bank's fi. fa.

15th April—Copy Bond's fi. fa. lodged with Registrar.

20th April—Sanction of Governor-in-Council to registration of Bank's fi. fa.

6th May—Transfer from Sheriff under Bank's fi. fa. lodged with Registrar, and registered.

10th May—Transfer from Sheriff under Bond's fi. fa., with sanction of Governor-in-Council endorsed, lodged with Registrar, and registration refused.

25th May—Sanction of Governor-in-Council to transfer under Bank's fi fa.

tenant's interest upon an unauthorised assignment. They cannot stipulate that, in case of the insolvency of the tenant, his assignee shall not take, though the lease might be made determinable on the insolvency. This point was not decided in ex parte Ellison,[2] where the lease did not purport to exclude an assignment by operation of law. Nor does "The Land Act, 1869" (No. 360), authorise the insertion of such a proviso in a lease granted under it.

a'Beckett, for the applicant, in support of the summons :—In Ex parte Ellison,[2] the Court did not decide that the registrar is not concerned with the condition of the lease, but merely that he had mistaken its effect; it seemed to be of opinion that he should register the transferee's title as subject to the same conditions. He must take notice of the conditions of a Crown lease—the conditions and limitations of the grant in fact—and, if he finds that a condition has been broken or not complied with, he must not register the transfer. This is not a case of ordinary lease under "The Land Act, 1869." Sec. 15 of "The Transfer of Land Statute" (No. 301), enacts that thenceforth grants in fee or for years, of Crown lands, shall be registered, and that the registration shall be taken to be an enrolment of record of the grant. Sec. 49 provides that the land included in any certificate of title or registered instrument shall be [*461] deemed to be subject to the conditions contained in the grant thereof. It is not the duty of the registrar to inquire into the validity of any condition in the grant, unless it be clearly inconsistent with some other condition in it. He has to deal with the registered title as he finds it, subject to all its conditions; if they are intelligibly expressed, he must give effect to them. It is submitted that the registrar was wrong in registering the transfer first lodged with him, it not being in conformity with the conditions of the lease; and he was also wrong (notwithstanding this registration) in not registering the transfer afterwards lodged by the present applicant, which did conform to such conditions. The Privy Council, in Paterson's case, did not decide that the second

2 5 V. L R. L. 59.

transfer could not have been registered, if the sale under the alias writ had been effectual. Sec. 37 seems to contemplate the registration of more than one title at once valeat quantum ; for it prescribes that every instrument presented for registration shall be registered in the order and as from the time it is produced for that purpose. If several writs of fi. fa. are registered, a sale under each may be registered ; the registrar is not to determine their priority, at that stage at any rate. No confusion would be occasioned, because all after the first would be noted as subject to all rights under the preceding ones. No caveat could have been lodged against the registration of the other transfer.

There is now no question whether the condition in question is one to the insertion of which in the lease the lessee could not have been compelled to submit. This being a Crown lease, we do not start with the fee simple in anyone, as in the case of a private title ; we start with a limited estate, created by Act of Parliament. Sec. 110 of "The Land Act, 1869" (No. 360) authorises the Governor to make rules and regulations, prescribing the form of leases issued under it, and the conditions upon which the same shall be issued, and for more fully carrying out the objects and purposes, and guarding against evasions and violations of the Act. One main object of the Act was to prevent any alienation within a certain time, and this condition is in pursuance of that object. In carrying out such object, the regulations may effectually prescribe a covenant not mentioned in the Act : Kettle v. The Queen[6] [*462].

Holroyd in reply :—It is unnecessary to argue that two transfers could not be on the register at the same time. Secs. 34-43 of Act No. 301 show that when land is transferred to a new proprietor, there is an entirely new start in the title ; the old proprietor is done with. Sec. 37 does not contemplate more than one transfer on the register at the same time ; the instruments it refers to are mortgages and other charges, of which any number may be registered without confusing the title. Sec. 49

[6] 3 W. W. & a'B. E. 141.

does not subject the land to invalid conditions in the grant, and the reason for its stating that the land shall be subject to the conditions, etc., in the grant, is that nothing of the kind is noted upon or in the certificate of title; it is not intended to give validity to conditions imposed under a subsequent Act. Sec. 110 of Act No. 360 does not authorise regulations for inserting conditions in a lease which are not prescribed by Sec. 202.

Cur. adv. vult.

Stawell, C.J.—The registrar has assigned two reasons for his refusal to register Bond's transfer. One, that it was his duty to register instruments in the order in which they are lodged with him for registration; and as an abstract proposition that may be so; but it is not his only duty: the other, that a special clause in the lease did not affect the transfer of an instrument under the "Transfer of Land Statute." If by this he meant that the special clause was void, it is quite correct. He has given a reason for what he did, namely, that he has performed his duty of investigating the law, and arrived at a conclusion that the clause was, in his opinion, void. But if he meant that this second reason was only subsidiary to and supporting the first, and that he was simply to accept all instruments in the order in which they were lodged, without reference as to whether they were valid instruments or not, he was, I venture to think, in error, and it is only right that he should be put in possession of the views of the Court on the point. The judicial duty is imposed on him of examining into the validity of instruments presented to him for registration. He is to investigate them and all the facts [*463] presented to him and say whether such instruments are valid or not. That appears to be the necessary conclusion from the 132nd and 135th sections of the Act. Sec. 132 prescribes the mode by which a certificate of title issued "in error" may be withdrawn. What is the meaning of "error?" Not, in my opinion, a mistake of fact only, but also an error in law. That section contains the expressions "issued in error or contains any misdescription of land or boundaries." And Sec. 135 provides that if the registrar

refuse to register he may be compelled to assign reasons; that is reasons in law as well as in fact. If merely the mechanical duty of registering instruments valid or invalid were imposed on him, the latter section would be scarcely necessary. This view of that section is confirmed by the decision of the Privy Council in Registrar of Titles v. Paterson,[4] where the question was asked, why did not the registrar appeal? evidently showing that in the opinion of their Lordships the responsibility was cast on him of preventing instruments being registered which in law, as well as in fact, ought not to be placed on the register. The intention of the Legislature was obviously to impose this duty on him in the first instance. The registrar is constituted the authority, subject to an appeal against his decision, to determine the validity of the instrument as well as the priority of registration in point of time; and, except in certain special cases, he is allowed his costs. He has, therefore, to discharge not merely ministerial but judicial duties. If he decide erroneously there is an appeal to this Court, and ultimately to the highest appellate tribunal. It may be that better provision could be advantageously made by bringing both parties claiming the land together, and allowing them to litigate between themselves; but that is no reason for disturbing the construction of the statute as it is at present framed.

In support of the validity of the instrument first registered, it was urged that the registrar was right in registering it; that the land was taken under a judgment, the lessee's estate sold and passed to the purchaser by operation of law, and the purchaser was entitled to a certificate of title; and that the clause in the lease prohibiting assignments by operation of law was void. [*464]

"The Land Act, 1869," Sec. 110, gives power to the Governor-in-Council to make regulations for the purposes theretofore mentioned, and for the execution of all matters arising out of, not inconsistent with, and not provided for by the Act. Sec. 20, which provides for conditions being inserted in the lease, never intended that such a clause should be inserted; and thus, apart alto-

[4] 2 App. Cas 110.

gether from the question of ultra vires as to the framing of the rules, the provision is in direct antagonism to the statute itself. The policy and intention of the Legislature, distinctly conveyed by the statute, was to place a stringent control over the licensee ; but when the license matured into a lease, and a lease was issued, the lessee was subjected to comparatively no control. The section provides that—" Every lease shall be for a term of seven years, and shall contain the usual covenant for the payment of rent, and a condition for re-entry on non-payment, and on payment of £1 for each acre the lessee or his representative shall be entitled to a grant in fee." There is no clause prohibiting an assignment. The licensee might never take a lease, he might at the expiration of his license pay up the £1, and take a Crown grant. The lessee is thus free from almost all the restrictions imposed on the licensee. Although it was considered desirable that during the license he was to be compelled to make improvements and remain on the land, yet when those improvements had been effected, and the lessee emerged from his chrysalis condition of licensee and had given satisfactory evidence of his future intention, it was no longer necessary to subject him to such restrictions, and the Act did not prevent his assigning his lease.

Apart from this view, the proviso that an assignment by operation of law should render the whole grant void is repugnant to that grant, and is therefore void. The conclusion of the registrar was sound, and the summons must be dismissed.

I omitted to notice that by Sec. 20 it is provided that the lessee or his representative should have a grant in fee. It might, perhaps, be supposed that the word "representative" was by implication opposed to a grant being issued to any person except the licensee himself or his personal representative, and so assignment by the lessee was prohibited by the statute ; but the word is not limited to [*465] personal representatives. Either a personal or a legal assignee may be a representative.

Simpson, J.—I quite agree that the commissioner is possessed of judicial functions in such a case as this, as

is shown in Paterson's case; at the same time, I think that the framers of the "Transfer of Land Statute" did not intend that he should hold that position. I have no doubt, however, that the registrar has the power, and that it is his duty, on the first application, to decide whether the applicant is entitled to registration. It is much to be regretted that the Act should leave so much defective as to determining disputes of this kind under it. I think it would have been much better to bring the adverse claimants face to face to litigate the title between them, after the manner of interpleader proceedings. With his decision in this case I quite concur. I think the registrar was right in refusing to register the second transfer, as long as the first remained on the register.

I agree also with the view that the clause in the lease is inoperative, and for two reasons, about which I have no doubt. The regulation is ultra vires; it is not in the Act; it is a mere departmental regulation, which can derive no authority except from the Act. I feel equally clear that if the regulation were valid, it fails to carry out what is said to be contemplated. It is plain to any lawyer that such language as this in the lease means nothing. There are means, invented by conveyancers, of determining a lease in certain events. There are questions whether a lease is void or only voidable—that is, as between the landlord and tenant. The present case is between two conflicting tenants. If it means to render the lease void on an assignment, that intention has not been expressed in intelligible legal language. It is an inartificial attempt to restrict a power of alienation, which the law says cannot be restricted, and is repugnant to the grant.

Higinbotham, J.—It was the intention of the framers of "The Land Act, 1869," to draw a distinction between licensees and lessees. The Act places every possible obstruction in the way of the licensee parting with his interest. It is equally clear that it was the intention of the Legislature to grant to the lessee, [*466] after he became lessee, facilities for alienation which the Act

endeavours to withhold from the licensee. As between landlord and tenant, the Crown would have power to make a condition in the lease against alienating by the tenant. But for the purpose of preventing alienation by operation of law, I apprehend that the only way by which that object could be effected would be to make the estate defeasible on certain events affecting the right to the land, by means of some acts arising from the operation of law. As between landlord and tenant, a condition of this kind could not be made so as to be effectual by declaring that no transfer or assignment by operation of law should be effectual till the consent of third parties was obtained, or the assignment registered at a particular place; that is, conceding that the Crown would have the right to put into any lease under "The Land Act, 1869," any covenant which a landlord might put into a lease to a tenant. I therefore think that this covenant or proviso is void.

It is the duty of the registrar to exercise a judicial opinion upon the validity of this proviso; being invalid, he could not give effect to it. He has in effect disregarded it, and has registered the party who lodged his transfer from the sheriff before the present applicant obtained the sanction to his transfer.

Summons dismissed.

Attorneys for the applicant:—Edwards & Perry, for Ireland, Horsham.

Attorney for the Registrar:—Sutherland, Crown Solicitor.

SUPREME COURT, VICTORIA, 1887.] [13 V. L. R. 255.

MAGOR v. DONALD.

"Transfer of Land Statute, s. 36—Instrument—Creation of easement—Attorney under power—Effect of registration.

A power of attorney authorised the attorney to receive and recover all moneys due to his principal and to carry out and complete all contracts made by him, and to enter into, conduct, and conclude any negotiation, contract, compromise, or arrangement in relation to his affairs, "and for all or any of the purposes aforesaid . . . . . to sign, seal, execute, deliver and accept all

receipts, releases, discharges, assignments, conveyances, re-conveyances, mortgages, transfers of mortgages, transfers, leases, surrenders of leases, covenants, agreements, contracts, memorials for registrations, bonds, submissions to arbitration, applications, notices, demands, caveats and other deeds, documents and assurances, whether made under or having reference to the 'Transfer of Land Statute' of Victoria or 'Real Property Act' of New South Wales or not, or other Statute or Act in the said colonies as the case may require."

Held, that this did not authorise the execution by the attorney of a creation of easement under the "Transfer of Land Statute" over land of which the principal was the registered proprietor, but that where he had executed such [*256] an instrument, inasmuch as it purported to transfer and grant an incorporeal hereditament, it was an "instrument purporting to affect land" within the meaning of Sec. 36 of the Act, and therefore upon registration under that section the grantee, in the absence of fraud, became the registered proprietor of the easement of right of way mentioned in the instrument and entitled to exercise the rights of a registered proprietor.

Questions of law reserved on the trial of the action by a'Beckett, J., for the opinion of the Full Court.

The action was brought by Mary Magor against Peter Donald to recover damages for trespass. The statement of claim alleged that the plaintiff was the registered proprietor under the "Transfer of Land Statute" and the occupier of a piece of land, part of Crown allotment one, at St. Kilda, and of a certain messuage thereon, and was entitled to a right of way from such land along a piece of land part of allotment one, coloured brown on her certificate of title, and alleged that the defendant had obstructed her enjoyment of the right of way and had trespassed thereon and had caused her damage by cutting down, destroying and removing the buildings, fences, gates and posts thereon, and injuring the plants, grass and herbage thereon.

The defendant alleged in his defence that he was the registered proprietor and occupier of land abutting on the land coloured brown, and claimed a right of way over the land coloured brown, by reason of a grant of such easement by an instrument of creation of easement, dated 18th August, 1886, made by and between one Edward Keep, the owner in fee simple of the land coloured brown, the grantor of the one part, and the defendant the grantee of the other part, and registered in the office of the Registrar-General No. 175,325, and

that the defendant, at the time of the alleged acts of trespass, had entered on the land coloured brown, and had in exercise of his right of way, broke in, down and removed a gate and fence which obstructed his passage.

By the reply the plaintiff alleged that the instrument of creation of easement was not made by Edward Keep, but by one Richard Anderson, as and being attorney under power for Edward Keep, the owner of the land coloured brown, and alleged that Anderson was not by any power of attorney or at all authorised by Keep to grant on his behalf any instrument of creation of easement. [*257]

The defendant as to the reply joined issue.

The instrument of creation of easement, which was duly registered on the 27th August, 1886, was in fact executed by Richard Anderson as the attorney under power of Edward Keep, under a power of attorney dated 13th February, 1885, which appointed him Keep's attorney, to demand, receive and recover all principal, interest and other monies then due and owing or payable, or which might from time to time become due, owing or payable under or secured or intended to be secured by any mortgage or mortgages or other security or securities, over any real or personal property, already executed or hereafter executed or on deposit receipts or simple contract or negotiable securities: And upon receipt of any such money to invest the same in manner provided: And also to carry out and complete all contracts and agreements made by Keep whether for loans or other matters:

"And to enter into, conduct and conclude any negotiation, contract, compromise or arrangement whatsoever from time to time in relation to any of my affairs which to my said attorney in his absolute discretion may seem proper or expedient, and for all or any of the purposes aforesaid for me, and in my name or as my act and deed to sign, seal, execute, deliver and accept all receipts, releases, discharges, assignments, re-assignments, conveyances, re-conveyances, mortgages, transfers of mortgages, transfers, leases, surrenders of leases,

covenants, agreements, contracts, memorials for registration, bonds, submissions to arbitration, applications, notices, demands, caveats and other deeds, documents, and assurances, whether made under or having reference to the 'Transfer of Land Statute' of Victoria or 'Real Property Act' of New South Wales or not, or other statute or Act in the said colonies as the case may require."

a'Beckett, J., at the trial, reserved for Full Court the questions of the construction of the power of attorney, and the effect of the registration under the "Transfer of Land Statute" of the instrument executed under it, and the case now came on upon the questions reserved.

C. A. Smyth and Box for the plaintiff:—The first question is whether Anderson had power to grant the easement, and the second is whether if he had no power the registration of it can have any effect. The power of attorney did not give any power to Anderson to deal with realty belonging to his principal; and if it did not, he had no power to create this easement. The registration of an easement by which [*258] one man professes authorisedly to convey away the land of another can have no effect. A different question might arise if the certificate had been issued; but in this case it has not. Mere registration of an invalid document could give it no effect: Ex p. Bond.[1] If the certificate had been issued in error, it might be called in by the registrar, under the Act, to be cancelled. The agent had no power under the power of attorney and the registration does not pass the interest; if it did it would be equivalent to the issue of a certificate, and it is not so: Kickham v. The Queen.[2] The registration cannot be conclusive because, under the "Transfer of Land Statute" (No. 301), the registrar may cancel the registration. See note to Sec. 36 in a'Beckett's "Transfer of Land Statute" (2nd Ed.). The commencing words of Sec. 42, providing

[1] 6 V. L. R. L. 462.
[2] 8 V. L. R. Eq. 1.

that "no instrument," which by Sec. 4 included creation of easement, "until registration in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act," show that the operation of the passing of the instrument is merely suspended until it is registered; but the mere registration of any document would not give it effect.

Neighbour and Hodges for the defendant:—A person registered under the Act is the proprietor of the estate until the registration is annulled. Sec. 36 provides that any instrument purporting to affect land under the operation of the Act shall be deemed to be registered when a memorial has been entered in the register book, and the person named in any grant, certificate of title or instrument so registered as the grantee or proprietor shall be deemed and taken to be the registered proprietor thereof. The defendant has lodged the instrument of creation in the office, and a memorial of it has been endorsed on the back of the certificate operated upon by it. He is therefore to be deemed the proprietor, and under Sec. 43 is entitled to receive a certificate of title to the same. One of the main objects of the Act was to make everything depend on registration. Keep himself could not come to the Court with this endorsement on his certificate, and dispute our right to the easement; he must first get [*259] the certificate rectified. By Sec. 49 Keep holds the land subject to the encumbrance notified on the certificate, which is conclusive, except in the case of fraud. It might have been a different matter between Keep and the present defendant, as in Miller v. Moresey.[3] In Ex. p. Bond the matter was brought up on an application from the Registrar of Titles to the Court, not on a mere action of trespass as here. It is sufficient for the person relying on the power of attorney to show that the act done under it was within the four corners of the deed. And the words are sufficiently wide to cover this case.

[3] 2 V. R. L. 193; 2 A. J. A. 115.

Smyth in reply :—There is always a specific clause in powers of attorney where it is intended to give the power of conveying lands, as under the form used under the "Transfer of Land Statue," schedule 16. Secs. 36 and 49 of the Act do not make registration as effectual as a certificate of title, as the defendant's argument, if good, would make it. The term "instrument" in Sec. 36 means a signed instrument, and the instrument must be signed by the person having power to sign.

Cur. adv. vult.

Higinbotham, C.J., delivered the judgment of the Court [Higinbotham, C.J., Williams and a'Beckett, JJ.]—Two questions have been reserved for the Full Court by the learned Judge who tried this action. The first question relates to the construction of the power of attorney by Edward Keep to Richard Anderson, executed on the 13th February, 1885. We are of opinion that Richard Anderson had not authority derived from this power to sign, as the attorney of Edward Keep, the instrument dated the 18th day of August, 1886, purporting to be a transfer and grant of an easement or right of way to the defendant Peter Donald. The second question relates to the effect of the registration under the "Transfer of Land Act" on 27th August, 1886, of the instrument above mentioned dated 18th August, 1886. We are of opinion that this instrument, purporting to transfer and grant an incorporeal [*260] hereditament, is an instrument purporting to affect land under the operation of the Act, within the meaning of the Act (see Sec. 4 "land" and "proprietor"), and that upon registration of the said instrument in the manner prescribed by Sec. 36, and in the absence of fraud, the defendant Peter Donald became, by virtue of Secs. 36 and 49, the duly registered proprietor under the Act of the easement of right of way mentioned in the instrument, and entitled to exercise the rights of such registered proprietor.

a'Beckett, J., then gave judgment on the whole case as follows :—In this case the plaintiff, by her statement

of claim, complained of a trespass by the defendant upon land coloured brown in her certificate of title over which she had a right of way, and of the destruction of buildings, fences, plants, etc., on this brown area. The defendant, in his defence, alleged that he had a right of way by grant from the registered proprietor over the land coloured brown which the plaintiff's buildings obstructed, and that the trespass complained of was merely the removal of these obstructions. The plaintiff replied denying that the defendant had the grant of the right of way in respect of which he entered. I reserved for the Full Court the question of whether the grant of right of way under which the defendant had justified was or was not valid, and its validity having been affirmed I should merely have had to direct judgment to be entered for the defendant with costs, if the pleadings had been confined to the matters I have mentioned. But new matter is introduced by the reply which alleges that the trespasses in the statement of claim mentioned were committed not only upon, but also out of, the land coloured brown, and at other parts of the land mentioned in the statement of claim, and for other purposes and on other occasions than those mentioned in the defence. The defendant joins issue on the reply generally, and there is therefore a contest on the pleadings as to whether there was or was not a trespass upon land other than the land coloured brown. It appeared on the evidence that the fence of the plaintiff's land did not exactly coincide with the boundary of the land as described in her certificate of title, but diverged as it approached the right of way, so that she was not occupying all [*261] the space to which she was entitled, and part of this excluded space was in fact included in what both parties treated as the disputed territory at the time of the trespass. On this small piece of land some small piece of the trellis or woodwork stood which the defendant removed. It was not contended for the plaintiff that the removal of the almost worthless material from this small piece of ground entitled the plaintiff to substantial damages, and no such contention could have

been sustained. It was urged, however, that with regard to costs, the question apparently trivial was material, and that the defendant who had inconsiderately and suddenly asserted his rights should be strictly dealt with as to any unjustifiable act committed in asserting them. If no additional cost had been occasioned by this minor question, I should have hesitated to deprive the defendant of costs because he had committed an incidental trespass of this slight character, but the issue is distinctly raised, and the evidence of surveyors, which might otherwise have been dispensed with, has been given in relation to it. The plaintiff succeeds on it. I therefore direct judgment to be entered for the plaintiff, with £1 damages. As to costs, I order the plaintiff to pay the costs of and occasioned by the reservation of the questions which have been determined by the Full Court, and I leave the plaintiff and defendant to abide all other costs of the action.

Judgment for the plaintiff with £1 damages for the trespass committed by the defendant; the defendant to have from the plaintiff the costs of questions reserved for the Full Court, the plaintiff and defendant each to abide his and her own costs otherwise.

Solicitor for plaintiff :—Hopkins.

Solicitors for defendant :—Maddock & Johnson.

SUPREME COURT, VICTORIA, 1885.] [11 V. L. R. 780.

IN RE "THE TRANSFER OF LAND STATUTE" (No. 301), EX PARTE DAVIES AND INMAN.

"Transfer of Land Statute" (No. 301), s. 117—Caveat—Right to summons caveator—Unregistered transferee—Supreme Court Rules, 1884—Ord. LXIII., r. 2—Practice—Urgency.*

An unregistered transferee of land under the "Transfer of Land Statute" (No. 301), is not a "proprietor" or "applicant" entitled under Sec. 117 to be notified of a caveat or to summon the caveator.

It is to be assumed, until the contrary be shown, that a single Judge, dealing under Ord. LXIII., r. 2,* of the Supreme Court Rules,

1884, with a matter otherwise required to be determined by the Full Court, considered it a matter of urgency and so had jurisdiction.

Appeal from an order of Williams, J.

The appellant, M. H. Davies, was the purchaser and transferee of certain land at Footscray held under the "Transfer of Land [*781] Statute" (No. 301). The land was registered in the name of W. H. Roberts, as proprietor. Roberts had sold to H. T. Clarton, who afterwards sold to Davis, to whom Roberts, at Clarton's direction, executed a transfer on 9th July, 1885. In the meantime, and after the sale by Roberts, a caveat was lodged on behalf of the respondent, Mrs. Inman and others, claiming an equitable interest in the land. Davies then summoned the caveator, the respondent Mrs. Inman, before Williams, J., under Sec. 117 of the "Transfer of Land Statute" (No. 301), to show cause why her caveat should not be removed. The learned Judge, however, agreed with the objection which was taken for the respondent, that the appellant was not a person entitled under the section to take out such a summons, and dismissed the summons. From this decision Davies now appealed.

a'Beckett and Topp for the appellant:—The question is whether the person to whom the registered proprietor has transferred his interest, but who has not himself become registered, can proceed under Sec. 117 of the "Transfer of Land Statute" (No. 301), to remove a caveat against the land which he has bought. It is submitted that he can. Sec. 116 provides for the lodging of a caveat by a person who claims an interest in the land; and Sec. 117 affords the means of removing such a caveat to the same class of persons, it is submitted, as those by whom a caveat can be lodged under Sec. 116. The respondent's contention is that Roberts, the registered proprietor, is now the only person who can proceed to remove a caveat. This disregards the word "applicant" in Sec. 117. That section expressly mentioned two persons, the registered proprietor and the person applying to become registered as the proprietor, and provides that any such proprietor or person applying to be proprietor may proceed as the appellant here has

done. The appellant applies to be registered as the proprietor by virtue of his transfer from the registered proprietor, and in the ordinary meaning of the words used in Sec. 117, he is, as such applicant, entitled to take out a summons.

Hodges, for the respondent :—The appellant must show that he comes within the words "such applicant or proprietor" in Sec. 117. It is admitted that he is not a "proprietor." Is he then "such [*782] applicant ?" It is submitted that he is not. The section clearly refers by the words "such applicant" to the person described in the beginning of the section as a person against whose application to be registered as proprietor a caveat had been lodged, and who is entitled by the section to be notified by the registrar of such caveat. Now an unregistered transferee is not intended by the statute to be notified of said caveat, and there are no provisions requiring any such notification to him. There are certain persons, not registered proprietors, for whom the statute specially provides that they may make application to become registered. Such are devisees or persons with power to appoint on a transmission (Sec. 52) ; persons entitled in remainder or otherwise in a transmission (Sec. 54) ; the assignee of an insolvent (Sec. 107). These are the persons intended to be referred to as "applicants," as they are the only persons not being the registered proprietor who can make any application to be registered. The appellant, therefore, as not being an applicant, nor a person entitled to be notified by the registrar of the caveat, is not entitled to proceed under Sec. 117, and his summons was therefore properly dismissed.

There was another ground for dismissing the summons, though it was not necessary to consider it at the time. Sec. 10 (vii.) of "The Judicature Act, 1883" (No. 761), provides that all proceedings upon or connected with caveats under the "Transfer of Land Statute" shall be heard and determined by the Full Court. There is nothing to show that this matter was one requiring immediately to be dealt with.

a'Beckett, in reply :—If a transferee cannot apply to be registered he is placed in a very disadvantageous position. How can a purchaser at a sheriff's sale be come registered at all ?

[Holroyd, J.—Sec. 106 specially provides for such a case.]

The right to get the caveat removed is not dependent upon receiving a notice from the registrar. There is nothing to make that a necessary preliminary. If a transferee can himself do nothing to remove a caveat he is at the mercy of a vendor who may sell and transfer to him when no caveat is lodged, and then [*783] refuse to take any steps to get rid of such a caveat lodged subsequently. The objection to the jurisdiction is met by Sec. 19 of "The Judicature Act, 1883" (No. 761), and Rule 2* of Order lxiii. of the Supreme Court Rules, 1884, enabling a Judge of the Court to hear at all times all such applications as may require to be promptly heard. This gives power to a single Judge to deal with any matter otherwise required to be dealt with by the Full Court only, if he thinks it a matter of urgency: re "Transfer of Land Statute," Ex p. Peck.[1] It is to be presumed that there was some reason for promptly dealing with this matter.

Cur. adv. vult.

The judgment of the Court (Higinbotham, Holroyd and Cope, JJ.) was delivered by Higinbotham, J. :—

This is an appeal from an order of Mr. Justice Williams dismissing a summons taken out by Mr. Davies, calling on the caveator, Mrs. Inman, to show cause why a caveat lodged by her on 22nd April, 1885, forbidding the registration of any person as transferee or proprietor, and of any instrument affecting the estate or interest in certain land, should not be removed.

Davies claimed under a transfer, not registered, made in his favour on 9th July, 1885, by one Roberts. The learned Judge appears to have held that Davies was

[1] 10 V. L. R. (L.) 328.

neither an "applicant" nor a "proprietor" within Sec. 117 of the "Transfer of Land Statute" (No. 301), and that he was not entitled therefore to summon the caveator with a view to the removal of the caveat.

We are of opinion that the learned Judge was right in so deciding. It was conceded that Davies was not the "proprietor" of the land in question; but counsel for the appellant contended that he was "such applicant" within the meaning of the section. The statute contains no general provision as to who shall be entitled in the case of a transfer by act of party of land brought under the operation of the Act to apply for the registration of a transfer. Until the transfer is registered, the estate and interest, with all appurtenant rights, powers and privileges, remains in [*784] the registered proprietor, Sec. 58. Special provisions are made authorising devisees and others claiming a power to appoint on a transmission, Sec. 52; persons entitled in remainder, reversion, or otherwise on a transmission, Sec. 54; and the assignee of an insolvent, Sec. 107, to make application in writing to be registered as the proprietor. It is only to those persons that the power to "make application in writing to be registered as proprietor" is given by express words, and it is to them only that this form of expression is applied in the Act. We think that, except in these cases, and in the additional case of a sale under a writ of fi. fa. issued out of the Supreme Court, Sec. 106, applications for registration must be regarded as applications made by the registered proprietor, and that an unregistered transferee is not entitled, under Sec. 117, to be notified of the caveat by the registrar, or to summon the caveator. This view is further supported by Sec. 135, where the proprietor is mentioned as the person who alone has a right to have a dealing or transmission registered. The policy of this enactment appears to be that the registrar shall not be brought into contact with or run the risk of incurring liabilities to a stranger who may choose to lodge a caveat, and shall be entitled in all dealings with land brought under the

operation of the Act to look to and deal with the registered proprietor alone of that land.

It was further contended for the respondent that as this was a proceeding upon or connected with a caveat, it should have been brought before the Full Court, and that a Judge in Chambers had no jurisdiction to deal with it. But I think we should assume, until the contrary is shown, that the Judge considered the application to be one that required to be immediately heard, and in such a case, according to our decision, Re "Transfer of Land Statute," Ex p. Peck,[2] a single Judge would have jurisdiction. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant :—Davies, Price & Wighton.

Solicitor for respondent :—Crocker.

1878.] [3 V. L. R. (E.) 266.

COLECHIN v. WADE.

27 Eliz. c. 4—"Transfer of Land Statute" (No. 301), ss. 3, 49, 50—Voluntary settlement—Certificate of title—Sale by settlor —Specific performance.

A voluntary settlement of land under the "Transfer of Land Statute" is void under the 27 Eliz. Cap. 4, as against a subsequent purchaser, with notice, from the settlor, notwithstanding that the volunteer holds a certificate of title as registered proprietor under the Act; and such subsequent purchaser may maintain a suit for specific performance against the settlor and the registered proprietor.

The bill in this case was filed by William George Colechin against Edmund Wade and his infant son Albert, upon the following facts :—

The defendant Edmund Wade being seized in fee of land situate in Faraday street, Carlton, brought it under the operation of the "Transfer of Land Statute," and in accordance with his [*267] directions a certificate of title, dated the 28th March, 1876, was issued in the name of his son, the infant defendant, as registered proprietor.

2 10 V. L. R. (L.) 328.

On the 11th January, 1877, Edmund Wade entered into an agreement with the plaintiff for the sale to him of the land for the sum of £300, subject to certain conditions of sale ; and the plaintiff paid a deposit of £35 as agreed upon. The vendor proposed to execute in the name and as guardian of his infant son a transaction under the statute to the plaintiff, but plaintiff refused to accept such a title and filed this bill, alleging that the issue of the certificate of title in the name of the defendant Albert Wade was purely voluntary, and therefore fraudulent and void as against him under the 27 Eliz. cap. 4 : offering to do equity ; and praying for specific performance of the agreement of the 11th January, 1877, for a declaration that the vesting of the land in the defendant Albert Wade was fraudulent and void as against him, and for a direction to Albert Wade, or to some proper person appointed to act for him, to execute a proper transfer to the plaintiff.

The defendant Edmund Wade, by his answer, admitted the allegations of fact in the bill and submitted the question of law to the judgment of the Court ; and the defendant Albert Wade put in the usual infant's answer.

Mr. Webb, for the plaintiff :—This is the ordinary case of a suit by a purchaser for specific performance, notwithstanding a prior voluntary settlement by the vendor, and the plaintiff is entitled to the decree in the terms of the prayer : Buckle v. Mitchell,[1] Daking v. Whimper.[2]

Mr. Kelleher, for the defendant Edmund Wade, consented to a decree as prayed.

Mr. Lawes, for the infant defendant:—The statute 27 Eliz. c. 4, has no operation where, as in this case, the land is held under the "Transfer of Land Statute." This question was argued, but not disposed of, in Moss v. Williamson.[3] [*268] By the preamble to the "Transfer of Land Statute" the object of the Act is declared to be "to give

[1] 18 Ves. 100.
[2] 26 Beav. 568.
[3] 3 V. L. R. (E.) 221.

certainty to the title to estates in land." The statute of Elizabeth being inconsistent with that object has no application in this case, and is in effect by Sec. 3 repealed as to all land under the Act. By Sec. 49 the certificate is absolute, and by Sec. 50 the title of a purchaser from the registered proprietor is unimpeachable save in the case of fraud—that is fraud in the inception of the proprietorship. The fraud must be then existing, and have relation to the acquisition of the proprietorship; and notice alone does not amount to fraud. The costs of the infant should in any event be provided for.

Mr. Webb in reply:—The principle upon which the statute of Elizabeth operates is, that the subsequent sale is evidence of a fraud in the original settlement. The operation of the statute of Elizabeth is not excluded by the "Transfer of Land Statute," a registered proprietor being bound by all equities affecting the sale: Maddison v. McCarthy.[4] The operation of the 13 Eliz. c. 5, affords a good test. There would be no protection afforded by the "Transfer of Land Statute" in the case of a voluntary settlement of land under that Act, with intent to defraud creditors.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH:—

This is a suit by Mr. Colechin against Mr. Edmund Wade and Albert Wade, his infant son, to enforce specific performance of a contract of Wade's (the father) for the sale of land to Colechin. The father, having acquired title to the land, applied to have it brought under the Act No. 301, and to have the certificate of title issued to his infant son, which was done 28th March, 1876. He afterwards wished to sell this land, and on the 11th January, 1877, entered into a contract with the plaintiff (who appears to have had full notice of the son's title) to sell it, partly for cash paid, partly to be paid.

[*269] If the conveyance had been made to the son without the instrumentality of the Act No. 301, by long established authority, it would be void under 27 Eliza-

[4] 2 W. W. & a'B. Eq. 151.

beth as against the plaintiff, and fraudulent in the language of the Act, explained by judicial decision. The doubt in the case, which is considerable, is whether the language of the Act No. 301 does not protect Albert's title. Popularly speaking there was no fraud in the Wades, the father giving to the son, nor in the father selling to the plaintiff, knowing of the certificate having issued to the son, yet with some doubt I have arrived at a conclusion in favour of the plaintiff, and in fact the father defendant. Courts have held subsequent conveyances to be a fraud on vendees, and I think the language of protection to proprietors was intended for real purchasers under the Act and persons dealing with them, not to sons taking presents from their fathers. To hold otherwise would make the Act protect cases of real, as well as constructive, fraud.

Declare that the contract should be specifically performed, and that upon payment of the balance of the purchase money by the plaintiff, William George Colechin, to the defendant Edmund Wade, the defendant Albert Wade should be a trustee of the land in bill mentioned for the said plaintiff; and direct the defendant Edmund, on behalf of the said Albert, to execute a proper assignment of the said land to the plaintiff, to procure a certificate of title to be issued to the said plaintiff, and direct the Registrar of Titles to issue such certificate. Order the plaintiff to pay the costs of the infant defendant, Albert Wade, and to have his own costs of suit and also the last mentioned costs over against the defendant Edmund Wade. Refer to tax. Liberty to apply.

Solicitor for the plaintiff :—Casey.

Solicitor for the defendant Edmund Wade :—Maunsell.

Solicitor for the defendant Albert Wade :—F. Maunsell.

SUPREME COURT, VICTORIA, 1886.] [12 V. L. R. 366.

IN THE MATTER OF THE "TRANSFER OF LAND STATUTE"

AND

IN THE MATTER OF THE APPLICATION OF JOHN BENN AND RICHARD GRICE.

"Transfer of Land Statute," s. 17, sub-secs. (1) and (5)—Trustees of fee simple, without power of sale—Right to bring land under the Act.

Trustees in fee of land, not having power of sale, are "owners," within the meaning of sec. 17, sub-sec. (1), and entitled to bring land under the operation of the Act.

Summons by the applicants, John Benn and Richard Grice, to the Registrar of Titles to substantiate and uphold the grounds [*367] of his refusal of an application made to bring certain land under the "Transfer of Land Statute."

The ground upon which the application was refused was that the applicants were not the owners of an estate in fee simple in the land applied for within the meaning of Sec. 17, sub-sec. (1), of the "Transfer of Land Statute" (No. 301). It appeared that the applicants were seised in fee, as trustees, but were not trustees for sale of the land.

Neighbour, for the registrar :—The applicants in this case were seised in fee, but were trustees not having a power of sale, and consequently the registrar refused to bring the land under the Act, on the ground that they were not included in that class of persons who are entitled to bring land thereunder. By Sec. 17 the classes of persons who can bring land under the Act are defined. By sub-sec. (1), any person claiming to be the owner of the fee simple, either at law or in equity ; and by sub-sec. (5), trustees for the sale of the fee simple may bring land under the Act. An "owner in equity" is the person who is the beneficial owner of the property, but whose legal estate is outstanding in a trustee ; and

such a person would come under sub-sec. (1). An "owner at law" is a person entitled to receive rents or profits of the land, and who has vested in him the power of disposing of such rents and profits. Trustees of the fee simple certainly do not come within the definition of either a legal or equitable "owner," and so cannot be included in sub-sec. (1). The words in sub-sec. (5) are limited to trustees for the sale of the fee simple. That is trustees for the purpose of selling; but, if the meaning were extended to a trustee who had not the power of sale, it would enable the trustee to commit a breach of trust. He would have a clear certificate of title, and could deal with the land as he chose. [Holroyd, J.—The registrar has power to lodge a caveat, and so have the beneficiaries.] A particular class of trustees is specified, and, therefore, all other trustees are excluded, and there is no reason why the meaning should be extended. [Williams, J.—The class is limited to "trustees for sale," because otherwise, if you were to allow a trustee who had no power of sale to bring the land under the Act, you might defeat the intention of a [*368] settlor.] By issuing a certificate of title, the whole intention of the settlor might be changed.

a'Beckett, for the applicants:—The provisions of sub-sec. (1) of Sec. 17 are wide enough to enable all trustees to be registered under the Act. The words "owner at law" are clearly distinct from "owner in equity," and, if that sub-section stood alone, it would certainly include that class of trustees in whom the fee simple was vested. But it is said sub-sec. (5) narrows the meaning of sub-sec. (1), and limits the word "trustee" to "trustees with power to sell." Sub-sec. (5) means and includes another class of trustees, namely, that class which cannot come in under sub-sec. (1), as the legal estate is not vested in them. It merely includes trustees with power to sell but who have no other powers at all. These applicants have no power to sell, but they are seised in fee simple, and have a right that their title should be established by bringing the land under the Act.

Cur. adv. vult.

Higinbotham, J.—The Registrar of Titles has been summoned, under Sec. 135 of the "Transfer of Land Statute," to substantiate and uphold the grounds of his refusal to grant an application under Sec. 17 to bring land under the operation of the Act.

The applicants claim to be the owners in fee as trustees, but not trustees for sale, of the land in respect of which the application is made. The Commissioner of Titles refused to entertain the application, on the ground that the applicants were not, in his opinion, the owners of an estate in fee simple, within the meaning of sub-sec. (1) of Sec. 17. It has been contended, for the registrar, that it is not the policy of the statute that trustees should be registered as proprietors of land, unless they are trustees for the sale of the fee simple, and that even then registration is, by sub-sec. (5), conditional, in a case where a previous consent is requisite, upon such consent being obtained.

It is necessary, in support of this view, to interpret the word "owner" in sub-sec. (1) as meaning the beneficial owner only, so [*369] as to exclude a trustee from the operation of that sub-section. But this limitation is inconsistent with the words in the same sub-section "either in law or in equity," which clearly includes the owner of the legal estate only, as well as the beneficial owner.

If we interpret sub-sec. (1) according to the plain legal meaning of its terms, sub-sec (5), interpreted in the same way, will apply exclusively to trustees who are trustees for the sale of the fee simple, but who need not have the fee simple vested in them. The probable policy of the statute cannot be allowed to control the express and plain terms of the statute.

The registrar has failed, in our opinion, to substantiate and support the grounds of his refusal to bring the land of the applicants under the operation of the statute. He will now be ordered to comply with the application; and, under the circumstances of the case, we deem it to be just further to order, under Sec. 72 of the Act No. 872,

that he shall pay to the applicants the costs and expenses of and attendant upon this summons, which will accordingly come out of the assurance fund.

Williams, J.—I concur in the judgment of the Court, but with some doubt.

Holroyd, J.—I also concur, but I do not agree with the view of the policy of the statute which has been submitted by the learned counsel for the registrar.

Summons, to compel the Registrar of Titles to register the applicants as proprietors of the land, granted with costs.

Solicitors for applicants :—Smith & Emmerton.

Solicitor for Registrar :—Sutherland, Crown Solicitor.

VICTORIA, 1887.] [13 V. L. R. 461.

OGLE v. AEDY.

Transfer of Land Statute," s. 138 (iv.)—Fraud of person not the owner bringing land under the Act in his own name—Ejectment —Cancellation of certificate of title—Execution of transfer to rightful owner—Expenses of bringing land under the Act—Mesne profits.

Where the owner of land had been deprived of it by the defendant having brought it under the "Transfer of Land Statute," and having obtained a certificate of title in his own name by means of false and fraudulent declarations, the Court would not order the Registrar of Titles to cancel such certificate, he not having been made a party to the action; but it ordered the defendant to give up possession of the land, with mesne profits for the time he had been in occupation; also to deliver up the duplicate certificate of title, and to execute a transfer to the plaintiff. The defendant was not allowed the expense of bringing the land under the Act.

Action by Mark Frederick Ogle against William Aedy to recover possession of about ten acres of land near Oakleigh, and claiming that the Registrar of Titles should cancel the defendant's certificate of title to the same, or that the defendant should transfer the same to the plaintiff, on the ground that the defendant had become the registered proprietor of the land through fraud of the defendant in making false statutory declarations in bringing the same under the "Transfer of Land Statute," or on the ground that the plaintiff had been

deprived of the land through its having been brought under the operation of the Act on the application of the defendant; or, in the alternative, damages under Sec. 144 of the Act.

The evidence for the plaintiff showed that the plaintiff had purchased the land in question on the 31st January, 1855, and [*462] obtained a conveyance. In 1856 the plaintiff himself went into occupation of the land, and remained in till 1857, when he let it to John James Smith, who went into possession and remained in as his tenant up to August, 1862, when the plaintiff, through his agent, Geo. Hardy, since deceased, authorised one Stocks to use the land for the grazing of cattle, he undertaking to look after it, and to prevent any person from cutting redgum timber upon it. Stocks paid no rent, but remained in possession of the land till 1876 or 1877, when he saw the defendant in the act of cutting redgum timber on the land; Stocks thereupon told the defendant that he had authority from the plaintiff to stop persons cutting the timber, and ordered him to stop, and the defendant desisted, saying he did not know he was doing any harm. In 1875 the defendant wrote to the plaintiff a letter (produced), asking to be allowed to rent the land, with the option of purchase. In 1881 the defendant applied to have the land brought under the "Transfer of Land Statute" as on a possessory title, and lodged in support of his application statutory declarations by himself declaring, inter alia, that he had been in possession of the land since 1863, and never heard of anyone claiming it. Upon the declarations the defendant was registered as proprietor under the Act. A large amount of evidence was also given for the plaintiff to show that the statements made by the defendant in the statutory declarations, made for the purpose of bringing the land under the Act, were false.

The defendant called no evidence.

Leon and Higgins for the plaintiff:—The uncontradicted evidence given for the plaintiff shows that the plaintiff or his tenants were in uninterrupted possession

of the land till 1876 or 1877. Even if it did not, there are two acts proved by the evidence, either of which would be sufficient to take the case out of the Statute of Limitations, and in itself is an acknowledgment of the plaintiff's title. The first is that in 1875 the defendant wanted to lease the land from the plaintiff; the second that in 1876 or 1877 the defendant was warned by the plaintiff's agent against cutting timber, and acquiesced in that agent's right to stop him.

[*463] Weigall (for Isaacs) for the defendant :—The plaintiff has not, by the defendant's obtaining a certificate of title, been deprived of the land, first because he had under the Statute of Limitations at that time forfeited all right to it; and secondly because, by the "Transfer of Land Statute" (No. 301), Sec. 49, that certificate is expressly made subject to a prior registered grant, which means a Crown grant, and here the plaintiff claims under the original Crown grantee.

[Webb, J.—If your latter point were good, no certificate of title could have any force, because every title begins with a Crown grant.]

The words are precise. They not only protect a prior registered certificate of title, but also a prior registered grant, which can only mean a Crown grant.

[Webb, J.—The section begins by saying, "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from Her Majesty or otherwise . . . . the proprietor . . . shall . . . . hold," etc.]

The plaintiff's remedy is barred by the Statute of Limitations. The only thing that could in any way be considered as taking the case out of that statute is the defendant's letter to the plaintiff in 1875, and the plaintiff is not entitled to rely on that as an acknowledgment by the defendant of the plaintiff's title so as to take the case out of the operation of the statute, because such an acknowledgment, to be efficacious, must be made by a person in possession; and the plaintiff asserts that the defendant was not then in possession of the land.

As the Registrar of Titles is not a party to the action, no order for the delivery up of the certificate of title can be made, and if the defendant be ordered to execute a transfer of the land to the plaintiff he ought to be recouped his expenses of bringing the land under the Act. The plaintiff should not get the benefit of the land being brought under the Act without also bearing that burthen.

Cur. adv. vult.

Webb, J.—In January, 1855, the plaintiff purchased the piece of land, the subject of this action, comprising about ten acres [*464] near Oakleigh, which was duly conveyed to him, and to which he has in this action proved a good paper title in fee.

In June, 1881, the defendant lodged with the Registrar of Titles an application to have this land brought under the operation of the "Transfer of Land Statute," and in such application claimed to be "the owner of an estate by possession" in the land. The only document lodged in support was a statutory declaration by the defendant himself, dated 26th May, 1881, as follows :—

"I, William Aedy, of Oakleigh, county of Bourke, farmer, do solemnly and sincerely declare that I took possession of the land applied for in the year 1863 when I fenced it in ; that I have held possession ever since and paid the rates ; that no one has ever made a claim to me for rent for the said land ; nor have I ever heard of anyone claiming the said land." That declaration appears to have been considered insufficient, for the defendant subsequently lodged a fresh statutory declaration, made by him on the 27th August, 1881, in which he described the land by measurements and a plan, and then proceeds, "The said land belonged to one Mark Frederick Ogle," that is the plaintiff, "he having purchased the same on or about the 31st day of January, 1855, from one Richard Gardiner Cooke," that being the date, and the name of the grantor, in the conveyance of the land to the plaintiff. "In the latter part of the year 1855 I entered into possession of the said land, and partly fenced in the same." He had previously said he took

possession and fenced in the year 1863. "In the year 1863 the whole of the said land was fenced in and enclosed, and also occupied, by me, and I have ever since been and still am in possession of such land. I have for upwards of twenty years had undisturbed possession of the said land, and I have for a number of years paid and do now pay rates in respect of the same." Another declaration was also lodged by the defendant, made by a Mr. Aitken on the 3rd September, 1881, in which he declares :—"That to my knowledge the said William Aedy fenced in and enclosed the said land about seventeen years ago, and such land is still fenced in. And I say that during the whole of that period the said William Aedy has been and still is in possession of the said land." It appears then to have been objected, in accordance with the practice of the office, with reference to the operation of the Statute of Limitations, [*465] that evidence must be given that the plaintiff was in the colony in 1863, and another statutory declaration was lodged, made by the defendant on the 18th of February, 1882, in which he declares that he had learnt from various people that the plaintiff was in the colony at the beginning and end of 1863, and he adds :—"I believe that the said Mark Frederick Ogle has been and is now residing in Maryborough, and carrying on business as a chemist and druggist." There were also two other declarations lodged in support of the application, one by Mr. W. J. Fookes, stating that he had made enquiries and had been informed that the plaintiff had not been out of the colony; and the other by Mr. E. R. Blood, who declared, "That the said Mark Frederick Ogle was in the said colony during the whole of the year 1863, and has been, and is now carrying on the business of a chemist in Maryborough." These six declarations are the whole of the materials lodged in support of the defendant's application to bring the land under the Act. It appeared on the face of the defendant's second declaration that the plaintiff had purchased the land. The registry would show that the title was still outstanding in him, and in two other of the declarations filed it was

stated that the plaintiff was then carrying on business in Maryborough. But nevertheless it does not appear to have been thought necessary to direct service of any notice upon him, as might have been done under Sec. 19 of the "Transfer of Land Statute," and, without the knowledge of the plaintiff, the land was brought under the Act, and a certificate of title, dated the 15th March, 1882, issued to the defendant.

The plaintiff now brings this action, claiming possession of the land, and to have the defendant's certificate of title cancelled, or the defendant ordered to transfer to the plaintiff, on the ground that the defendant became the registered proprietor through fraud, the statutory declarations made by the defendant being alleged to be false in several particulars stated in the statement of claim. The plaintiff, in the alternative, claims relief on the ground that he has been deprived of the land through its having been brought under the operation of the statute on the application of the defendant, which is independent of fraud. The plaintiff in a further alternative claims damages under Sec. 144 of the Act. [*466]

The defendant by his pleading denies the fraud and alleges that all the statements in his declarations were true, or, at all events, if not true in fact, that he honestly believed them to be true. But at the trial he practically left the case undefended so far as the charges of fraud are concerned, and relied solely upon legal and technical objections taken by his counsel. A large amount of evidence was given by the plaintiff to show the falsity of the statements made by the defendant in his declarations. He, on the other hand, neither went into the box himself nor called any witnesses to attempt to prove their truth. Nor did he call Aitken to support the declaration made by him.

Upon the evidence, I have no hesitation in finding that all the material statements in the defendant's declaration were untrue, and that to the defendant's knowledge, and were therefore not only false but fraudulent. One of these statements is that the defendant had, ever

since 1863, held possession of the land, and had paid rates on it. The evidence of the rate collector is that the defendant never paid any rates before 1883, whereas the payment of rates was put forward by the defendant as evidence of his possession, in order to obtain the certificate of title, which was issued to him in March, 1882. Another statement is that the defendant had never heard of any one claiming the land ; the fact being that in September, 1875, less than six years before making the declaration, the defendant had written to the plaintiff a letter produced in evidence, and admitted by the defendant's counsel to be his, asking to be allowed to rent the land with a right to purchase. Another statement is that the defendant for upwards of twenty years prior to August, 1881, had been in undisturbed possession of the land, the evidence showing that until August, 1862, the land had been in possession of Smith, a tenant of the plaintiff, that then a neighbour (Stocks) was put in possession, under an agreement with the plaintiff's agent that he might have the right of grazing over the land if he protected the timber from being cut, and in 1876 or 1877 the defendant commencing to cut a redgum tree on the ground was stopped by Stocks from so doing, who told him he had authority from the plaintiff to look after the land and not allow any one to cut timber, and thereupon the defendant desisted, saying he did [*467] not know he was doing any harm. It appears that some of the defendant's cattle occasionally grazed on the land in common with those of Stock's (who all along represented the plaintiff) and other neighbours, the land not being until recently completely enclosed. But upon the evidence I have no doubt, and so find, that the defendant was never in exclusive possession of the land until after the issue of the certificate of title to him in 1882.

For the defendant it has been contended that the plaintiff was not deprived of this land by reason of its being brought under the Act, because in 1882, when it was brought under the Act, the title of the plaintiff was determined by the operation of the Statute of Limitations. To this there are several answers. First, I find

as a fact that the plaintiff, by his tenant and caretaker, was in possession of the land, at all events down to 1876 or 1877, when there was a distinct assertion of ownership by his agent on his behalf, and a recognition of his right of ownership by the defendant. Again, even supposing the plaintiff, the true owner, to have been out of possession, his title was recognized by the defendant in his letter of September, 1875, which amounts to an acknowledgment, so as to take the case out of the statute. Against this it is urged that such acknowledgment must be made by a person in possession of the land, and that the plaintiff contends the defendant was not then in possession. This argument certainly does not lie in the defendant's mouth, whose whole case is that in 1881 he acquired a title by possession for more than fifteen years. If he was in possession in September, 1875, the acknowledgment was by a person in possession ; if he was not in possession in September, 1875, he had no right to declare in 1881 that he had been in undisturbed possession since 1863, and thereby obtain a certificate of title under the Act.

Upon the facts of this case, I find, upon the uncontroverted evidence of the plaintiff and his witnesses, that the plaintiff has been deprived of this land by the fraud of the defendant, and that the defendant has been registered as proprietor of this land through such fraud. That being so, the plaintiff is entitled to maintain ejectment against the defendant, the case falling within the exception in Sec. 138 (iv.) [*468.]

The next question is whether this Court can, in this action, order the registrar to cancel the certificate of title issued to the defendant. It is urged for the defendant that the registrar being no party to this action, no order upon him can be made in it. I think this objection must prevail, but the plaintiff is entitled to the alternative relief that he seeks, viz., the execution by the defendant of a transfer of the land in question to the plaintiff. The defendant has committed a gross fraud upon the plaintiff by means of knowingly false statements made by him in certain statutory declarations

by means of which he induced the officials of the Titles Office to grant him a certificate of title to land to which he had no right or claim whatever. It is fortunate for the plaintiff that he has discovered the fraud, and is able to intercept the land, before it has been transferred to an innocent purchaser for value. This being so it is unnecessary to consider the plaintiff's alternative claim for damages.

It is urged for the defendant that if he is ordered to execute a transfer to the plaintiff, he ought to be recouped his expenses of bringing the land under the Act. But in incurring these expenses he in no way acted as the agent or at the request of the plaintiff; and the plaintiff is under no legal obligation to pay them. As to the argument that the plaintiff should not get the benefit without bearing the burthen, it is possible that the plaintiff may not regard his land being brought under the Act as any benefit at all. His strict right would be, were it possible to effect it, to be placed in statu quo ante, and have his land taken from under the Act. But I know of no means by which that can be done. If there were such, and the plaintiff elected to keep his land under the Act, there might be some force in the argument that he should pay the expenses incurred in bringing it under the Act. In the absence of this I can see no force in it whatever.

The evidence shows that the defendant has been in exclusive possession of the land since March, 1882, the date of his certificate of title. The plaintiff is therefore entitled to mesne profits, which, upon the evidence, I assess at £50.

Judgment for the plaintiff for possession of the land in question, and for £50 mesne profits. Order the defendant within seven days after service upon him of this judgment to deliver up to the plaintiff, or to his solicitor, the duplicate certificate of title issued to the defendant, vol. 1,324, fol. 264,768, and to execute [*469] forthwith, upon the same being tendered to him for execution, a transfer of the plaintiff of the land therein comprised, and all other necessary documents for the purpose of transferring such land to the plaintiff, such transfer and other documents to be settled in Chambers in case the parties differ. Order defendant to pay the plaintiff his costs of

this action, including the costs of preparing, settling, and procuring the execution of such transfer and other documents. Refer to tax. Liberty to apply.

Solicitors for plaintiff :—Hart & Benjamin, for Samuel & Horwitz, Hamilton.

Solicitors for defendant :—Crisp, Lewis & Hedderwick.

VICTORIA, 1875.] [1 V. L. R. (E.) 111.

GUNN v. HARVEY.

"The Mining Statute, 1865" (No. 291), ss. 101, 124, 129—Courts of mines—Cross relief—Jurisdiction—Demurrer—Certificate of title—Cancellation.

The Supreme Court has concurrent jurisdiction with Courts of Mines; but generally would not exercise such jurisdiction, in matters within the jurisdiction of the latter Courts.

Where a trespass suit was instituted in a Court of Mines by the holder of a certificate of title to a mining lease, and the defendant filed a bill in Equity impeaching the certificate for fraud, the Court, upon demurrer, refused to entertain the suit; on the ground that the matters put forward in the bill were available as a defence to the plaint in the Court of Mines, and that any active relief required by the plaintiff in Equity might be given in the Court of Mines by way of cross relief.

The Supreme Court in Equity has no jurisdiction to order the cancellation of a certificate of title. The proper mode of giving relief from the inequitable effect of such a certificate is by ordering the registered proprietor to execute a transfer.

Bill by W. Gunn, C. Pike, I. Thompson, W. Eastman, W. Gunn the younger, A. Rechie, J. Hopkins, and N. Brown against J. Harvey and The Nell Gwynne Quartz Mining Company (Limited), to the following effect :—

In July, 1871, one J. F. Edwards applied under "The Mining Statute, 1865," for a gold mining lease of a certain piece of land, particularly described in the bill, and in his application stated that he was applying on behalf of the Herald Company. At this time the land was occupied as a mining claim by Edwards and all the plaintiffs other than Brown, under miners' rights, and they were in partnership under the style of the Herald Company, but the company was not incorporated. Edwards made the application for the lease at the request of his co-partners, and they consented to the lease being

issued to him as a trustee for the partnership. On the 8th January, 1872, a lease of the land was issued to Edwards.

On the 1st December, 1873, Edwards sold to the plaintiff Gunn all his interest in the lease and partnership; and, in accordance with an agreement between Edwards and the other partners that he should transfer the lease to Gunn to be held by him in trust for the partnership, Edwards, on the 31st December, 1873, applied to the Minister of Mines for permission to transfer the lease; [*112] and such license being given, Edwards, on the 17th February, 1874, transferred to Gunn all his estate and interest in the lease: and such transfer was taken in trust for himself and his co-partners. In May, 1874, Gunn, with the consent of his co-partners, sold to the plaintiff Brown the share in the partnership which he had bought from Edwards.

The Herald Company was at the time of the grant of the lease, and still remained, in occupation of the land; and until service of an injunction from the Court of Mines, Sandhurst, was carrying on mining operations; and the original lease and transfer had ever since their respective dates been in the possession of the plaintiffs as such partners.

On the 9th February, 1875, the plaintiffs Gunn, Pike, Hopkins and Rechie, were served with an injunction of the Court of Mines at Sandhurst in a suit wherein the present defendants were plaintiffs, and the present plaintiffs Gunn, Rechie, Hopkins, Pike and Gunn, jun., were defendants, whereby the present plaintiffs were restrained from mining on the land until the hearing of the suit or further order of the Court.

By the plaint to the Court of Mines, it was alleged that the defendant Harvey was the registered proprietor of a leasehold estate for an unexpired term in the land comprised in the lease of the 8th January, 1872, and this the bill admitted.

On the 10th July, 1873, one Atkinson, by his attorney Sanders, issued a plaint summons in the Sandhurst

County Court against Edwards to recover ten shillings due him, and on the 8th August, 1873, Atkinson recovered judgment for this sum, together with eighteen shillings costs. On the 2nd December, 1873, one Sayers, for Edwards, paid £1 8s. to Atkinson, and on the 3rd December this sum was repaid to Sayers by Edwards.

The bill then alleged that on the 2nd December, 1873, and after Atkinson had been paid, Welsh, an attorney, purporting to act for Atkinson, but in fact without any instructions from Atkinson, and without his or Edwards' knowledge, applied to the registrar of the County Court at Sandhurst, and, having represented to him that he was acting as attorney for Atkinson in the place of Sanders, and that the amount of the judgment was unpaid, obtained from him a certificate under the "County Court Statute," [*113] 1869, (No. 345), of the judgment, and that the debt was unpaid; and, having filed this certificate in the Supreme Court, signed final judgment for that amount, together with the fees authorised by the statute.

On the 12th January, 1874, Welsh, still purporting to act as attorney for Atkinson, but without his knowledge or authority, issued a writ of fi. fa. upon the final judgment; and on the 21st January, 1874, the sheriff of the Sandhurst and Castlemaine District caused all the right, title and interest (if any) of Edwards in the lease to be put up for sale by the public auction. The plaintiff Gunn attended at the sale, and objected thereto, and delivered to the sheriff a protest against his selling any interest in the lease, it having been applied for by Edwards for and on behalf of the Herald Company. This protest was read by the sheriff at the sale, in the presence of Welsh and Harvey, and the sheriff then announced that he was only about to sell the interest of Edwards in the lease "if any," and thereupon Harvey became the purchaser for £3 10s. Welsh was present with Harvey at the sale; and on his behalf, he paid a deposit of one pound; and he acted as his solicitor, and subsequently procured a certificate of title to be issued

to Harvey, as proprietor of the leasehold estate in the land.

The plaintiffs other than Brown were in possession and occupation of the land, and engaged in mining thereon at the time of the sale, and had (with Brown, since the date of his purchase) ever since been, and still were, in possession, and had, as partners, paid out of their partnership funds the rent for the lease to the present time. Harvey had never entered into possession, and until the suit in the Court of Mines, neither he nor the defendant company had ever claimed to be entitled to possession, or in any way interfered with the plaintiffs.

The bill then alleged that at the time when Welsh obtained the certificate from the Registrar of the County Court, and signed final judgment, he knew, or had reason to believe, that the money had been paid, and the proceeding of Welsh was wholly unauthorised by Atkinson; and at the times of his purchase and the issuing of the certificate of title to him, Harvey well knew, or at all events had notice through his solicitor Welsh, that the [*114] judgment and execution had been irregularly and improperly obtained, and was not binding on Edwards, or those claiming under him; and the plaintiffs submitted that the certificate of title was obtained by fraud, within the meaning of the 49th section of the "Transfer of Land Statute," and was not valid against the plaintiffs; and they further submitted that, inasmuch as Edwards was a trustee of the lease for them, it could not lawfully be taken in execution or sold by the sheriff under the writ against Edwards, and that the seizure and sale, and the subsequent issue of the certificate, were invalid.

In the plaint in the Court of Mines it was alleged that the defendant company were beneficially interested in the land, and that Harvey held it as trustee for them. The bill, therefore, sought discovery from the defendant company, and charged that, if it ever acquired, or purported to acquire, any beneficial interests in the lease from Harvey, the company had, prior

to such acquisition, notice of the rights of the plaintiffs, and that Edwards was a trustee only for the plaintiffs, and of the circumstances under which the certificate of title was issued to Harvey.

The bill prayed for a declaration that the purchase by Harvey was invalid as against the plaintiffs, and that the certificate of title was void, and ought to be delivered up to be cancelled, and that it might be ordered to be cancelled accordingly; and for an injunction to restrain the suit in the Court of Mines.

The defendants demurred separately, but on the same grounds: (1) Want of equity. (2) Uncertainty. (3) That the Court ought not to entertain jurisdiction. (4) That the plaintiffs did not allege that they had not a good defence in the Court of Mines; and (5) That Edwards was a necessary party.

Mr. a'Beckett for the demurrer of the defendant Harvey:—This Court has no jurisdiction to cancel a certificate of title; and, further, it is open to the plaintiffs to make their defence in the Court of Mines. The only irregularity pointed out by the bill is in procuring the sale by the sheriff; but it is not to be inferred from the bill that anything was wanting in the proceedings to affect their validity, while, on the other hand, it is to be inferred that the document under which the plaintiffs claim [*115] was not an effectual and proper instrument under the "Transfer of Land Statute."

Edwards still remained the registered proprietor. The present defendant got on the register in a way altogether unexceptional, except so far as he was concerned in getting a sale from the sheriff. The mere facts of equitable interests being outstanding, of which the sheriff had notice, is immaterial: Robertson v. Keith.[1] It was never intended that this Court should correct the books of the registrar. The 132nd section, which provides for cancellation, etc., has received a very wide construction in the case of Re Paterson.[2]

[1] 1 V. R. Eq. 11.
[2] 4 A. J. R. 26, 110.

As to the charge of notice, a statement in the alternative such as here may be accepted in either view the demurring defendant chooses : Balls v. Margrave.[3] Here there is no allegation which at all helps out the uncertainty of the view of the allegation in the bill which we adopt, namely, that it is that Harvey had notice through his solicitor. Welsh's employment was subsequent to the sale. He did not pay the deposit money as solicitor, and therefore notice to him is insufficient. The only way in which a registered proprietor can be affected is by fraud. He must have participated in the fraud ; but here all the bill says is that the defendant had constructive notice of equitable interests, and this does not amount to fraud within the meaning of the Act.

Mr. Holroyd for the demurrer of the defendant company :—The bill asks for a declaration that the purchase was invalid, and that the certificate should be delivered up to be cancelled, and for an order for cancellation. The demurrer is on the ground that the bill shows no equity, and that if this Court has jurisdiction it ought not to be exercised.

By Sec. 34 of the "Transfer of Land Statute," certificates of title are in duplicate. Great confusion would ensue if the order for cancellation is made. There could be no transfer to any one else. Certainly this Court cannot order one of the original certificates to be delivered up and cancelled, and leave the other outstanding. But Sec. 132 provides for all cases of this nature. The Act had created an entirely new mode of transferring land, [*116] and gives greater powers to the Registrar of Titles. The 135th section provides for the intervention of this Court if he does not do his duty. We admit that this Court has power to direct a transfer, but it has not any jurisdiction to order a particular document to be delivered up to be cancelled, and this is the only ground on which the Court is now asked to restrain proceedings in the Court of Mines.

But supposing the Court has jurisdiction, we have

[3] 3 Beav. 284.

a right to demur, as this is a case in which it ought not to exercise its jurisdiction. The cases in this Court upon the subject are: McCafferty v. Cummins,[4] Mulcahy v. The Walhalla Company,[5] The United Working Miners' Gold Mining Co. v. The Prince of Wales Co.[6] All these were argued on the ground that there was no jurisdiction, and it was held that there was jurisdiction; but none of them decided that if it appears on the bill that another Court is a proper Court to entertain the matter, and can give substantial relief, this Court will entertain the suit. Looking to the English case we find an analogy: for as Courts of Mines have been spread over this colony; so in England, Courts of Bankruptcy have been spread over the country; and the Court of Chancery has refused in many instances to exercise its jurisdiction in matters which could be entertained by the Court of Bankruptcy. In Martin v. Powning,[7] a case of fraudulent trusteeship, the Court held that the objection might be raised by demurrer where another Court had co-ordinate jurisdiction. Similarly: Stone v. Thomas,[8] Maguire v. O'Reilly,[9] Thompson v. Derham.[10].

If the Court has jurisdiction, and this is a proper case for the exercise of it, then the bill should have asked for a transfer, not for cancellation of the certificate: Robertson v. Keith.[11] [Molesworth, J.—In the cases that have been before me, so far as I recollect, the form of relief sought has been to direct a transfer, not a delivery up and cancellation of the certificate.] Yes, and in the case of Brew v. Jones[12] the prayer was that the defendant [*117] should be declared a trustee on the ground that the certificate had been obtained through fraud.

[4] 5 W. W. & a'B. L. 61.
[5] Argus, 20th May, 1868.
[6] 6 W. W. & a'B. Eq. 8.
[7] L. R 4 Ch 356.
[8] L. R. 5 Ch. 219, 225.
[9] 3 J. & L 224, 239.
[10] 1 Hare, 358, 377.
[11] 1 V. R. Eq. 11.
[12] 2 V. R. Eq. 20.

Lastly, supposing Edwards had improperly transferred away, or was repudiating his trust, the Court of Mines could restrain him from parting with any interest; and Harvey does not stand in a worse position than Edwards.

The plaintiffs do not make a specific charge of notice. They try to fix Harvey with constructive notice through his solicitor, and the company is sought to be fixed with notice through Harvey. The fact of one man being trustee for somebody else is not notice of anything whatsoever.

Mr. Webb for the bill :—The purchaser acquired notice of all Welsh, his solicitor, knew. There are numerous cases to show that a person acquires notice of all his solicitor knows in the transaction. [Molesworth, J.—Surely all the facts are consistent with the purchaser dealing fairly. Besides, we are not dealing with the case of setting aside the execution : we are dealing with persons claiming under a paramount title.] Edwards was a trustee for the plaintiffs ; and the plaintiffs say that the whole transaction by Welsh and Harvey was a scheme to obtain the plaintiffs' property. [Molesworth, J.—That is not charged in the bill.] That is the necessary inference to be drawn from the facts alleged.

As to the question of jurisdiction, the Court of Mines has no jurisdiction as to fraud. This was a plaint for trespass. What answer would it have been to say that the certificate had been obtained by fraud ? The present plaintiffs could not institute a cross suit based on the alleged fraud. The jurisdiction of the Court of Mines is limited by Sec. 101. This Court will entertain any case of fraud. The fraud itself gives the jurisdiction. Again, it is said that the bill asks for the wrong relief, and ought to have prayed for a transfer of the lease. But the proper course is to have the sale set aside and the certificate cancelled. The present defendants have never entered into occupation. The plaintiffs have been in possession all along, and therefore the purchaser

takes nothing: Rogertson v. Keith.[13] [Molesworth, J. —You have asked for a particular relief. How can I [*118] cancel the certificate ?] The certificate is issued in duplicate. One part is in Harvey's hands, and if he delivers this up, and it be cancelled, he will be rendered harmless. The 132nd section gives no jurisdiction to the registrar in matters of fraud; that section applies only to cases of wrong plans, etc. The decision in the case of Re Paterson[14] would have been analogous if they had gone to the registrar first, and then to the Court. [Molesworth, J.—If you disembarrass this case from the "Transfer of Land Statute," and supposing it is a case of a trustee disposing of the cestui que trust's property, would not the Court of Mines have power to give relief ?] No, it has no jurisdiction. All the cases in this Court that have been cited are in favour of this Court retaining, and not ousting, its jurisdiction. In the English cases complete relief could be given in the other Courts, but no such complete relief can be obtained in the Court of Mines. A demurrer will not lie if the plaintiffs can obtain any of the relief sought; and here the plaintiffs are entitled to some of the relief prayed. A bill seeking to set aside voluntary settlement, and asking for its delivery up to be cancelled, would not be demurrable. It is only necessary to get the present certificate removed, and then the plaintiffs can register their transfer from Edwards. If necessary, a decree for a transfer may be made under the prayer for general relief.

Mr. a'Beckett in reply:—If possession confers an equitable right, it is cognisable in every Court, and therefore in a Court of Mines.

Mr. Holroyd in reply:—The rule as to giving relief under the prayer for general relief is that the relief must be consistent with the specific relief prayed. By Secs. 124 and 129 of "The Mining Statute, 1865," any cross relief whatever may be obtained in the suits in which the defendant is attacked. [Molesworth, J.—Does

[13] 1 V. R. Eq. 11.

[14] 4 A. J. R. 26, 110.

the cross relief extend to law as well as to equity proceedings ?] The provision of the Act is of the most ample character. [*119]. The whole scope and policy of the Act are to have disputes of this kind decided in the locality. [Molesworth, J.—Could not a suit have been instituted in this Court ?] Undoubtedly, but this Court will not entertain a suit of this kind, when a local Court has jurisdiction, and is already seised of the case. In this colony nothing has been decided on this point; but Martin v. Powning[15] shows that the right way to raise the question is by demurrer.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

This case comes before me upon demurrers by Mr. Harvey and the Nell Gwynne Quartz Mining Company to a bill of Mr. Gunn and seven others.

The bill states that Mr. Edwards, in July, 1872, obtained a gold-mining lease from the Crown as a trustee for a company not incorporated, called the Herald Company, to be taken, speaking generally, as now represented by the plaintiffs, which company has been in occupation and working the leased land from thence until February of this year; that Mr. Atkinson recovered judgment in the County Court, Sandhurst, for 10s. debt and 18s. costs against Edwards; that in December, 1873, Edwards sold his interest as a shareholder to Gunn, and on the 2nd December paid his debt to Atkinson. But on the same day a solicitor, not employed by Atkinson, assuming to act for him, applied to the Registrar of the County Court, and obtained a certificate under the Act No. 345, Sec. 93, and final judgment as for Atkinson in the Supreme Court for £1 8s., and for the fees. In the meantime, Edwards, who had agreed with his former partners to assign his interest in the lease as a trustee to Gunn, December 31, 1873, applied for a consent of the Governor to his so assigning.

[15] L. R. 4 Ch. 456.

The solicitor, as for Atkinson, issued a fieri facias on the judgment, January 12, 1874, and delivered it to the sheriff of the district ; and on January 21 the sheriff set up for sale the right, title and interest, if any, of Edwards in the lease. Gunn attended the sale, and delivered to the sheriff a written protest, stating that Edwards was a trustee for the Herald Company, and had sold his separate interest. This protest was read in the presence [*120] of the audience, including the solicitor and Harvey, and the sale then proceeded, and Harvey bought for £3 10s. The solicitor paid the deposit for Harvey, and acted as his solicitor in the matter of purchase, and subsequently of procuring a certificate of title for him. The bill alleges that the solicitor, when he obtained the certificate from the registrar of the County Court and signed final judgment, knew, or had reason to believe, that the amount of the County Court judgment had been paid to Atkinson ; and that, at the time of his purchase and the issuing to him of the certificate of title, Harvey well knew, or at all events had notice through his said solicitor, that the judgment and execution had been irregularly and improperly obtained, and was not binding upon Edwards. The consent of the Governor to Edwards' assignment of the lease having been obtained, a memorandum of transfer of it to Gunn was executed February 17, 1874. The plaintiffs were left in undisturbed possession, but the present defendants proceeded by plaint against them in the Court of Mines, Sandhurst, and obtained, and February 9, 1875, served, an injunction upon them, against mining upon the land in question until further orders. This bill was sealed April 13.

This case involves difficult questions as to the conclusive effect of the certificate of title. But I have to consider, under one ground of demurrer, whether these plaintiffs should obtain any of the relief sought by this bill, having regard to the jurisdiction of the District Court of Mines, and the proceeding actually pending in it.

Titles to mining claims and leases existed before,

but were placed on a different footing by the Act No. 291, which created the present Court of Mines. It seems to me that the Supreme Court has a concurrent jurisdiction with the Courts of Mines as to these titles. It has been exercised, I may say without question, in Mulcahy v. The Walhalla Company [16] (which was carried to the Privy Council), and various other cases. On the other hand, I think that the powers of the Courts of Mines under the Act No. 291, Sec. 101, would authorise them to give relief on the facts of this case so far as this Court could. Taking them as Courts of co-ordinate jurisdiction, though of unequal dignity, according to some authorities to which I have been referred—Martin v. Powning,[17] Stone v. Thomas,[18] Maguire v. O'Reilly[19]—as between the Courts of Chancery in the mother country and Bankrupt and Insolvent Courts, the jurisdiction of the former is not ousted, but is generally not concurrently exercised in certain matters within the jurisdiction of the latter ; and that may be decided upon demurrer to a bill in chancery.

The relief prayed by this bill is a declaration of right, and that the defendant Harvey's certificate of title may be ordered to be cancelled. I do not think that this Court has jurisdiction to do so. The way in which I have relieved from the inequitable effect of certificates is to order the holders of them to transfer.

The next relief is that, in the meantime, the defendants may be restrained, by the injunction of this Court, from further proceeding with the suit in the Court of Mines ; and there is a prayer for general relief. The Court of Mines has full power to consider all the matters put forward in this bill as a defence to the plaint there, and to give cross relief (Secs. 124 to 129). Taking the Courts as having co-ordinate jurisdiction, this is a suit to stay proceedings pending in the other Court, very

[16] Argus, 20 May, 1868.

[17] L. R. 4 Ch. 356.

[18] L. R. 5 Ch. 219.

[19] 3 J. & L. 224.

inconvenient, and no ground for convenience stated. In The United Working Miners' Co. v. The Prince of Wales Co.,[20] I had to consider arguments as to a bill partly seeking to control proceedings in the Court of Mines, and overruled a demurrer, as some relief I would otherwise grant was sought. But in this, I would not grant the rest of the relief sought; and restraining the proceedings in the Court of Mines would be a mere assumption of superiority without any reason. I therefore allow the demurrer with costs; liberty to apply to amend within a month.

Solicitors for plaintiffs:—Brown & Ellison, Sandhurst.

Solicitor for defendants.:—Hornby.

SUPREME COURT, VICTORIA, 1887.] [13 V. L. R. 2.

NATIONAL BANK OF AUSTRALIA v. MORROW.

"Transfer of Land Statute," s. 106—Purchase at sheriff's sale—Entry of transfer—Rights of equitable mortgagee—Practice—Argument on points of law before trial of issues of fact—Ord. XXV. r. 9—Points not raised on pleadings—Right to begin.

Under Sec. 106 of Act No. 301, a purchaser of land at a sheriff's sale under a writ of fi. fa. does not become the transferee nor can he be deemed the proprietor thereof, until such transfer is entered by the registrar in the register book.

A sale by the sheriff under a writ of fi. fa. does not necessarily exclude the rights of an unregistered equitable mortgagee, whose right has accrued before the service of a copy of the writ of fi. fa. upon the Registrar of Titles.

Patchell v. Maunsell (7 V. L. R. E. 6) distinguished. [*3] Where points of law are referred to the full Court for determination before the trial of issues of fact, the plaintiff should commence, and he has in every instance the right of reply.

Quaere, whether the argument must not be confined to the points raised on the pleadings.

Question of law raised on the pleadings.

This was an action brought by the plaintiff to enforce its claim as equitable mortgagee, and for an injunction to restrain the registration of the transfer of a lease to

[20] 6 W. W. & a'B. Eq. 8.

the defendant, unless such transfer be made subject to a notification on the certificate of title to be issued to the defendant, of the plaintiff's equitable mortgage as an encumbrance affecting the lease. The defendant in his amended defence objected that a purchase from the sheriff for value and without notice, under an execution issued on a judgment in the Supreme Court when all the requirements of Sec. 106 of Act No. 301 have been complied with, is not affected by an unregistered security. The parties referred this question of law to the Full Court before the trial of the issues of fact. The material facts of the case are fully set out in the judgment of the Court.

Hamilton for the plaintiff :—It has not been yet decided whether the plaintiff has the right to begin in proceedings of this nature, or as to what points the defendant or the party raising an objection on a point of law is bound to adhere to. It has been suggested that under Ord. xxv., r. 9, the party may state one point of law on his pleadings, and at the hearing thereof he may raise any others he deems advisable.

Per Curiam :—We think it well to follow the practice laid down with reference to points of law reserved. The plaintiff should commence, and he has always the right of reply. We doubt whether a party can raise any point save that distinctly raised upon the pleadings.

[The defendant asked for leave to amend the defence in order to set out a material averment which was necessary for the determination of the real question in dispute. Leave was granted, and the hearing was adjourned until February, 1887.] [*4]

Hamilton for the plaintiff :—It is submitted that the purchaser from the sheriff for a valuable consideration cannot get a better title than if he purchased directly from the judgment debtor. The interest of the judgment debtor is affected by an equitable mortgage to the bank, for it has been held that such liens do affect land under the Act No. 301, although it may be impossible to register such liens : London Chartered

Bank v. Hayes.[1] The fact that the sheriff sells the interest and estate of the judgment debtor cannot operate to give a better title than the debtor could himself have given. The sheriff cannot transfer a larger estate than the debtor had—non dat quod non habet. According to the form given in the fifteenth schedule of the Act, the sheriff merely sells "the estate and interest" of the debtor. Undoubtedly if the defendant had succeeded in getting the transfer entered the plaintiff would have been prevented from asserting its interest; but the defendant had stopped short of that act. Patchell v. Maunsel,[2] although at first sight an authority against the contention of the plaintiff was decided upon the ground that the defendant had been guilty of laches. According to Kickham v. The Queen,[3] the purchaser from the sheriff is not in a very strong position until he gets his transfer registered.

Helm and Topp for the defendant:—The defendant having purchased for valuable consideration and without notice of any encumbrance, cannot be prejudiced in his title by an equitable mortgage. This Act must be treated by itself, and due effect given to the policy of the Legislature. According to the provisions of Sec. 42 a written instrument intended to operate as a charge upon land is absolutely void unless registered; if the plaintiff's view be correct, then a charge not in writing will be better than a written instrument, and although unregistered will be just as effectual to bind the land as a registered document. In Registrar of Titles v. Patterson,[4] it was said: "The general object and intention of the "Transfer of Land Statute" are to simplify titles to land by making them depend wholly on registration." This [*5] Act does not protect unregistered charges, and as between third parties it does not recognise a mortgage by deposit of deeds. In all cases where an equitable mortgage has been held good, the charge existed be-

[1] 2 V. R. E. 104; 2 A. J. R. 60.

[2] 7 V. L. R. E. 6.

[3] 8 V. L. R. E. 1.

[4] Ap. Ca. at p. 116; 46 L. J. (P. C.) 21.

tween the mortgagor and mortgagee, and there was no intervention of a third party: London Chartered Bank v. Hayes[5] is not applicable to a case like the present. There is no authority which extends so far as to say that a purchaser for value without notice is to be postponed to the person who merely has an equitable mortgage. It is entirely a question of notice. The defendant has fulfilled all the requisites of the statute, but the plaintiff has neglected to take any steps to preserve its rights, until the last moment, when it seeks to prevent the defendant from perfecting his title. If a caveat had been lodged, the duty would have devolved upon the defendant then to take due care. Sec. 37 provides that instruments have priority according to date of registration, and not according to the date of the instruments; and here the defendant is prior to the plaintiff, as he has presented the instrument for registration first. A purchaser at a sheriff's sale would never be safe if he could not get a good title. According to White v. Neylon[6] "There is nothing in the wording of the Act" (which was of a similar character to this) "to exclude a claim upon an unwritten equity of which the subsequent registered purchaser had notice." The duty of the holder of such an equity is to give notice. A concealed instrument cannot defeat a bona fide purchaser: Patchell v. Maunsel.[7] That case governs the present. The statute alters the old law. If two purchasers bought the same piece of land from the owner, and both paid the purchase money, he who first got the conveyance would get the land.

[Holroyd, J.—You have not got the conveyance, you have stopped just one step short.]

The plaintiff has not got the conveyance either, and we have the better equity. The registrar was bound to enter this transfer, and had no right to heed the notice given by the plaintiff. The registrar cannot know anything about an unregistered charge, and he is not sup-

[5] 2 V. R. E. 104; 2 A. J. R. 60.

[6] 11 Ap. Ca. 171 at p. 176; 55 L. J. (P. C.) 25.

[7] 7 V. L. R. E. 6.

posed to wait until a supposed [*6] claim is ascertained. There is no injunction in this case. Looking at the form provided in the 15th schedule to the Act, it will be seen that the sheriff purports to convey all "the estate and interest of E. F.," and if there be any encumbrances they must be duly set out, and in the absence of such notification of existing charges, the purchaser gets a clear title.

[Holroyd, J.—If the judgment debtor had a bad title, could the sheriff give the purchaser a good one ?]

Perhaps not. We contend that the plaintiff has no interest wherewith it can maintain this action. An equitable mortgagee can get a legal mortgage under the Act.

Hamilton in reply :—The registrar is not bound to register as of course ; he has "a judicial duty imposed on him of examining into the validity of instruments presented to him for registration:" Ex. p. Bond.[8] Sec. 42 does not apply to this case at all.

Cur. adv. vult.

[Counsel for plaintiff subsequently handed to the Court the case, In re Elliot.[9]]

The judgment of the Court (Higinbotham, C.J., Holroyd and Kerferd, JJ.) was delivered by :—

Higinbotham, C.J.—The plaintiff became equitable mortgagee on 7th December, 1885, of a lease to Margaret McDonald, the lease being then deposited with plaintiff by Robert B. Calvert, to whom the lessee was indebted, to secure payment of a promissory note for £1,197 2s., then discounted with the plaintiff. Judgment was recovered on the 20th April, 1886, against the lessee, Margaret McDonald, in an action by the defendant, Thomas Morrow. Execution was issued ; the sheriff sold and transferred the lessee's interest in the lease to the defendant Morrow, who lodged the transfer for registration at the Office of Titles. It was admitted on the argument that such transfer was not entered in the

[8] 6 V. L. R. L. at p. 462.

[9] 8 A. L. T. (N. S. W.) 59.

register book by the defendant Richard Gibbs, Registrar of Titles, before the [*7] commencement of this action. The action is brought by the plaintiff to enforce its claims as equitable mortgagee, and for an injunction to restrain the registration of the transfer of the lease to the defendant Morrow. The point raised by the defendant Morrow, and which we have now to determine, is whether a purchaser from the sheriff for value and without notice under an execution issued on a judgment of the Supreme Court, when all the requirements of the 106th section of the Act No. 301 have been complied with, is or is not affected by an unregistered security. The point of law thus stated is not easily applied to the facts of the present case. It is now admitted that the most important of all the requirements of the 106th section, namely, the entry of the transfer in the register book, has not been complied with, and the pleadings do not disclose the dates of the sale or the transfer by the sheriff, or of the receipt of the transfer by the registrar for registration. The view at which we have arrived as to the meaning and effect of the 106th section enables us, assuming the admission to be part of the pleadings, to answer the question substantially in the affirmative.

Under the 106th section a purchaser of land or of a lease, mortgage or charge does not become the transferee nor is he deemed the proprietor thereof until the transfer has been received by the registrar and entered by him in the register book. Before that time, and before serving on the registrar of a writ of fieri facias or of a decree or order of the Supreme Court, the land is not bound, charged or affected in any way by the execution or by the lodgement of the writ for execution. The land, etc., is bound by the service on the registrar of the copy writ, and continues to be bound until entry of the transfer or the expiry of three months from the day on which the copy writ was served. The sale under the writ itself does not affect the right of any purchaser for valuable consideration (including an equitable mortgagee) whose right has accrued before service of the copy, even though such pur-

chaser had actual or constructive notice of the lodgement of the writ for execution. Against such a purchaser, the purchaser from the sheriff acquires no right until he gets his transfer completed by registration and becomes the transferee and the proprietor ; and even then there [*8] may be cases in which his title to the land, etc., may be impugned, and he may be ordered to reconvey to an earlier purchaser for valuable consideration of whose charge or encumbrance he has had notice. The purchaser from the sheriff in fact only buys a charge upon the judgment debtor's interest in the land, and that charge is clearly subject to any earlier equitable or legal charge. It is by virtue of the language of the statute that the moment the transfer from the sheriff to the purchaser has been entered on the register, the purchaser becomes the transferee of the land, etc., and is to be deemed the proprietor thereof.

The defendant Morrow maintained that having lodged his transfer for entry, the registrar ought to have entered it, and he ought to be deemed for the purposes of this suit to be in the same position as if the registrar had entered it. In the case of Patchell v. Maunsel,[10] Mr. Justice Molesworth decided that the registrar ought not to refuse to enter on the register a transfer duly presented to him by a purchaser at a sheriff's sale merely because he has notice of prior unregistered encumbrances. Assuming this to be correct, there is nothing in the present case to show that the registrar refused or neglected to make the entry or that the entry could in due course have been made before he was served with the writ in this action. The question is answered in the affirmative with costs to the plaintiff.

Solicitors for the plaintiff :—Malleson, England & Stewart.

Solicitor for the defendant :—W. A. Evans.

[10] 7 V. L. R. E. 6.

VICTORIA, 1881.—HOLROYD, J.] [7 V. L. R. (E.) 137.

CAMPBELL v. JARRETT.

Will—Construction—Way of necessity—Jurisdiction—"Transfer of Land Statute"—Correcting certificate—Procured by fraud—Executor—Costs—Exhibits.

A testator, who was owner of a block of land, devised to his son that portion of it which was occupied by his son at the testator's death, and devised to his daughter the portion of it occupied by himself. The testator had, during his lifetime, exercised a right of way over portion of the land in his son's occupation to give access to the land in his own occupation.

Held, that under the will the daughter had the same right of way of necessity which had been exercised by the testator during his lifetime.

A Court of Equity has no power to correct a certificate of title procured by fraud, but can make a decree ordering the defendant to transfer and vest in the plaintiff the land included in such certificate.

A testator devised a portion of his land to his daughter and another portion to his son, whom he appointed executor. The son induced his sister to sign an application to bring the land under the "Transfer of Land Statute." In a suit by the daughter to rectify the certificates issued to her brother, as not correctly showing the portions to which each was respectively entitled, the defendant (the executor) was ordered to pay the costs on the ground that he did not see that the plaintiff sufficiently understood the application she was signing. At the conclusion of a case, the defendant is entitled to have his exhibits back.

Suit by Harriet Campbell against George Jarrett to have two certificates of title issued, as the plaintiff alleged, by the Titles Office in error, induced by the fraudulent misrepresentations of the defendant, corrected so as to include the lands to which the plaintiff and defendant were respectively actually entitled.

Stephen Jarrett, deceased, the father of the plaintiff and of the defendant, was at the time of his death, seised in fee simple of a piece of land, situated in Percy street, Portland, on a portion of [*138] which he resided, and carried on business as ironmonger. He made his will on the 30th March, 1877, which was, so far as material to the case, as follows :—

"I give, devise and bequeath to my son, George Jarrett (the defendant), the yard and premises, together

with the buildings erected thereon now in his possession and occupation absolutely. I give, devise and bequeath to my youngest daughter Harriet (the plaintiff), my land and premises in Percy street, in the said town, together with the shop and iron store and other buildings erected thereon, for her life. From, and after her demise, I give and bequeath the same to my said son, George Jarrett, absolutely." The testator, by his will, appointed the defendant and one F. Schofield executors.

At the eastern end of the land fronting Percy street was the "iron store" mentioned in the will, which extended nearly across the land from north to south, and covered a space of eleven feet from east to west, and was used almost exclusively by the testator for storing iron goods, etc. At the time of the testator's death the defendant was, and for many years prior thereto had been, with the testator's consent, in possession of the northern twenty-eight feet of the land fronting Percy street, and extending back to the iron store, on which he had erected a forge and workshop, and carried on the business of a smith and wheelwright. The southern twenty-eight feet, as far back as the iron store, was covered by a shop and yard which was occupied and used by the testator. Between the shop and yard and the land occupied by the defendant's forge and workshop, there was a strip of land ten feet wide, or thereabouts, which had been formed into a road, running from Percy street to the iron store. There was a conflict of evidence as to whether the testator or the defendant formed the road; but it was proved that the defendant's workmen used to work over the road, and the defendant's materials were left on it, but that carts and waggons conveying stores and other matters for the use of the testator used to pass regularly over the road to the store. It was also proved that whenever the road was blocked by the defendant's materials, so that waggons with the testator's goods could not pass along it, the defendant's workmen either cleared the way for the passage of the waggons, or carried the goods from the waggons to the store.

[*139] After probate of the testator's will had been granted to the executors, the defendant suggested to the plaintiff that the land should be brought under the "Transfer of Land Statute," and certificates issued to the plaintiff and defendant respectively of the portions of the land passing to each under the will. The plaintiff assented to this. The defendant swore that at the time he proposed this he explained to the plaintiff what portions respectively each was to have. This was, however, absolutely denied by the plaintiff. It was further sworn by the defendant that an express agreement was arrived at between him and the plaintiff that the plaintiff should have the southern twenty-eight feet frontage to Percy street to the full depth of the land, and the defendant the northern thirty-eight feet to the full depth of the land, including the road and half the store at the rear, in consideration of his giving up his claim to a portion of the southern twenty-eight feet, which the defendant claimed under the will as having been occupied by his works. This agreement was also denied by the plaintiff.

An application to the Titles Office was signed by both executors, and also by the plaintiff, to bring the land under the Act, and have two certificates issued. The defendant, in support of the application, made a statutory declaration on the 13th July, 1879, in which he stated—"I am the George Jarrett referred to in the will of the said Stephen Jarrett by the words, 'I give and bequeath to my son, George Jarrett, the yard and premises, together with the buildings thereon, now in his possession.' The land described by the will of the said Stephen Jarrett as 'the yard and premises, together with the buildings thereon now in his possession,' is the northern 38 feet of the land, the subject of this application, and is part of the land devised to me by my father, Stephen Jarrett, by his said will." The bill charged that at the time the deponent made this declaration he well knew that a portion of the iron store, specifically devised to the plaintiff, stood on the northern 38 feet, and also that the same included the road used by Stephen Jarrett; and that the defendant had never been in possession

or occupation of the northern 38 feet of the block, but only of that portion of it having a frontage of 28 feet to Percy street, by a depth of 137 feet 6 inches. Certificates [*140] of title were issued—one to the defendant, giving him the northern 38 feet of the land, including half of the store at the rear and the whole of the road, and the other to the plaintiff, giving her a life estate in the southern 28 feet of the land and the portion of the store standing thereon.

There was considerable conflict of testimony as to what portion of the land was occupied by the defendant's works and materials at the time of the testator's death, and as to what portion of the land was called "the yard."

Disputes arose between the plaintiff and the defendant subsequently to the issue of the certificates of title, and the defendant refused access over the road to the plaintiff, and locked up a door and gate leading from her portion of the land on to the road. The plaintiff submitted that the certificates should be corrected by the Court, so that the certificate issued to the defendant should comprise the northern portion of the land, with a frontage to Percy street of 28 feet and a depth of 137 feet 6 inches, and the certificate to the plaintiff, the remaining portion of the land, without any right of way over the road, being reserved to the defendant, and prayed that the defendant be ordered to deliver up his certificate of title to be corrected.

Mr. Webb, Q.C., and Mr. Neighbour for the plaintiffs:—It is clear that by the will the whole of the store at the rear of the premises was given to the plaintiff, and the defendant has improperly procured a portion of it to be included in his certificate. The will really gives nothing in Percy street to the defendant. The latter part gives everything in Percy street to the plaintiff; and if there is any repugnancy in the provisions of the will, the latter provisions must prevail over the former. The latter provisions cut down the estate given to the defendant to a mere remainder. [Mr. Justice Holroyd:—My present impression is that in the construction of the will

the whole of the iron store is given directly to the daughter for life, with a right of way over the road. If the testator gives the store by his will, and he himself had a right of access to it over the road during his life, that right passed by the will as a way of necessity.] We contend we are entitled to the road absolutely. There was at the testator's [*141] death, at most a joint occupancy of it by the testator and the defendant, and such a joint occupancy would not satisfy the words of the will. In order to pass the road to the defendant, he should have had exclusive occupation of it at the time of the testator's death.

The defendant is not corroborated as to the alleged agreement between him and the plaintiff prior to the issue of the certificates of title, and is contradicted by the plaintiff.

A Court of Equity has jurisdiction to correct the certificates of title, inasmuch as they were procured by the defendant's fraud. Many suits have been successfully brought to obtain title to land under the Act, which had been transferred through a fraud. The suit has been occasioned by the fraud of the defendant, and the plaintiff should get her costs.

Mr. a'Beckett and Mr. Topp for the defendant :— The plaintiff claims too much by her bill ; she asks for an estate for life in the road, and does not even offer to grant the defendant a right of way. The defendant is entitled under the will to the fee in the road, though the plaintiff may be entitled to a right of way over it.

There is no jurisdiction to order the certificates to be given up to be corrected, or to correct them. Secs. 132 and 133 of the "Transfer of Land Statute" (No. 301), expressly provide a remedy where a certificate has been fraudulently or wrongfully obtained, and that form of remedy should have been pursued by the plaintiff. Where a statute which imposes an obligation provides a specific means of procedure for enforcing it, no other course than that provided by the Act can be pursued: Maxwell on Statutes, 366. A certificate of title is a new kind of document of title issued by a public officer,

and is not made inter partes like a conveyance; if it is to be rectified or altered in any way, the Registrar of Titles, the officer who signs the document, is a necessary party to the suit.

If the Court holds that the plaintiff is entitled to a right of way over the road, it should be a qualified right of way: Gale on Easements (5th Ed.), 337—otherwise the plaintiff may insist on the defendant not using the road at all.

[*142] As to costs, the plaintiff has always claimed more than she was entitled to, and has made an unfounded charge of fraud against the defendant. She alleges in her bill that she was not aware of the application to bring the land under the Act, but it was proved she signed the application.

Mr. Webb, Q.C., in reply.

Mr. Justice Holroyd :—The will, amongst other devises and bequests, devises the "yard and premises," then in the defendant's occupation, to the defendant absolutely, but does not specify where the yard and premises devised are situated. But it was proved in evidence that for years before his father's death the defendant was in occupation of certain portions, with smithy, workshops, etc., these being erected on what was called the yard. The yard and premises referred to are those which abutted on Percy street. Then the will devised to the plaintiff for life the testator's "land and premises in Percy street, together with the shop and iron store and other buildings erected thereon." I think the land and premises there referred to, especially with reference to the words "shop and store," refer to a strip of land with the whole iron store. The shop is specially mentioned which faces the street. It is said that a road was made from Percy street to the store, but that was never separated from the rest of the yard except by being better laid down. The testator does not in the will refer to any road. Looking at the state of things when the will was made, I think that the defendant had the use of the yard and of the road also. The testator, when he wanted goods taken to his store, insisted on the

road being cleared, or the goods being carried to the store. It was so till his death. I also think that it was the intention of the testator that the plaintiff should have the store with the right of access to it over the road. That made it improper to block up the right of access to the store, and to retain part of the store. The defendant is entitled to the land to which I have already referred, subject to a right of way over the road similar to the right exercised by the testator in his lifetime. It is said for the defendant that if the right of way is given to the [*143] plaintiff over this land, she may insist on no obstructions being placed on it, but I will consider how this is to be prevented.

As to the costs, the defendant was an executor, and if a certificate of title was obtained to the land, he should have obtained a proper one. He proposed to the plaintiff that certificates should be issued. She asked him about the division of the land. He said that she knew that they were to be according to the will. I do not think that any one could have understood from that conversation what land was to be given to her, and what was to be kept for the defendant himself; she was justified in thinking the will would be followed. It is said that she was bound by the application, signed by her, to bring the land under the Act. She says it was not read to her; but even if it was read, I do not think it would enlighten her on the subject. She was a woman dealing with her brother and his solicitor, and they should have seen that she knew what she was about. For these reasons I think the plaintiff is entitled to her costs. That is my present view.

It is said for the defendant, that I cannot give the exact relief asked for. But the bill asks for a declaration that the plaintiff is entitled to the land; if the relief asked for, as consequent on that, is not the exact relief the plaintiff is entitled to, I can, under the prayer for general relief, make a decree that the defendant be directed to do what is necessary to carry out the will. The defendant caused the suit by not doing what was right as executor, and by not seeing that the plaintiff under-

stood the application for the certificate of title. For that reason I shall give costs to the plaintiff. I shall not make a formal decree at present, but will consider the form of decree I shall make.

Mr. Justice Holroyd :—I have already stated the grounds of my decision, and shall make the decree in the terms I have minuted. No further directions being reserved, the costs of suit will include the costs of working out the decree, that is, of preparing and executing the necessary transfers and other instruments, and of preparing certificates of title, conformable to the foregoing declarations, and the costs, if any, of the reference to the Master to settle.

[*144] The measurements of the land, as stated in the bill, in the plans, Exhibits A and C, and in the certificates of title put in evidence, all differ in some particulars. In framing any necessary transfer or instrument, the true measurements should be adopted with this proviso, that the depth of the whole block, as given in the certificate of title, viz., 148 feet 6 inches, must not be varied unless by mutual consent of the parties; and that by "the piece of land having a frontage of 28 feet to Percy street" is to be understood the piece of which the frontage is formed by the shop and dwelling house occupied by the testator at his death. Declare that the defendant is entitled to be registered under the "Transfer of Land Statute" as the proprietor of an estate in fee simple, subject to the right of way hereinafter mentioned in all that piece of land on the northern side of the block in the plaintiff's bill mentioned, having a frontage of 38 feet to Percy street, by a depth of 137 feet, or thereabouts, from Percy street to the store in the said bill mentioned at the eastern end of the said block. And declare that the plaintiff is entitled to be registered under the said statute as the proprietor of an estate for life in all that piece of land on the southern side of the said block, having a frontage of 28 feet to Percy street by a depth of 148 feet 6 inches, except so much thereof as is occupied by part of the said store, together with the right during her life for her and her

assigns and her or their servants or tenants, and other persons authorised by her or them, or her or their tenants, to pass and repass with or without horses, carts, waggons and other carriages, laden or unladen, from Percy street to the said store, over that part of the land occupied by the defendant, which is described in the said bill as a road, for the purpose of ingress, egress and regress to and from the said store, and to and from any part of the premises in which the plaintiff is hereinbefore declared to be entitled to an estate for life, other than the said store. And declare that the defendant is entitled to be registered under the said statute as the proprietor of the remainder in fee simple in both the pieces of land in which the plaintiff is hereinbefore declared to be entitled to an estate for life. Decree that plaintiff and defendant do respectively execute all such transfers and other instruments, and do all such other things as may be necessary to give effect to the foregoing declarations, and order that the plaintiff do prepare the necessary transfers and instruments for that purpose, and submit the same to the defendant for approval and execution; but refer it to the Master to settle such transfers and instruments in case the parties differ about the same. Order the defendant to pay to the plaintiff her costs of suit. Refer it to the Master to tax the said costs. Liberty to apply.

Mr. a'Beckett asked that the probate of the will and the defendant's certificate of title, which had been put in as exhibits in the cause, be given up to him.

Mr. Neighbour objected that the certificate should not be given up. It was obtained by fraud, and was the very document [*145] sought to be rectified. If given up to the defendant, it might be encumbered in some way, so as to throw obstacles in the plaintiff's way.

Mr. Justice Holroyd :—I suppose there is a lis pendens registered. I have no power to correct the certificate itself. As the suit is ended, I think the defendant is entitled to have his exhibits back. Order made.

Solicitors for the plaintiff :—R. H. Smith for Lyne, Portland.

Solicitor for defendant :—Reynolds.

VICTORIA, 1879.—MOLESWORTH, J.] [5 V. L. R. (E.) 147

CULLEN v. THOMPSON.

"Transfer of Land Statute" (No. 301), ss. 49, 50—Fraud in acquiring certificate—Adverse possession—Tenant—Mortgager and mortgagee—Constructive notice.

The word "fraud" in Secs. 49 and 50 of the "Transfer of Land Statute" (No. 301), does not include fraud of the conveying party in acquiring title. Chomley v. Firebrace [5 V. L. R. (E.) 57] distinguished.

Semble, the protection afforded by Sec. 49 of the "Transfer of Land Statute" (No. 301) to a tenant does not extend to protect the title of the landlord.

A., a registered proprietor of land under the "Transfer of Land Statute," borrowed money from B., and was induced by him to sign a document which he supposed to be a security, but which was a transfer by him to B. of the land. B. had himself registered as proprietor, and mortgaged the premises to C. The premises were throughout in the occupation of a weekly tenant of A., who paid rent to him. Upon the discovery of B.'s fraud, A. filed his bill against B. and C. for redemption.

Held, that but for the "Transfer of Land Statute" (No. 301), Sec 50, C. would, by the tenancy, have been affected with constructive notice of A.'s rights, but that that section protected him, and that the mortgage to C. was good as against A.; and decree for redemption made upon payment by A. or B., and if by A., then B. ordered to repay him.

Suit by James Cullen against James William Thompson and John Gull Johnson for a declaration that an instrument of [*148] transfer absolute in form was by way of mortgage, and that plaintiff was entitled to redeem the land comprised therein and to be registered as proprietor in fee free from encumbrances, and in the event of the defendant Johnson being held entitled as against the plaintiff to a valid mortgage, then for an account of what was due thereunder; and that the defendant Thompson might be ordered to pay the amount with costs, and that upon payment being made by the defendant Thompson or the plaintiff, the defendant Johnson might be ordered to execute a proper memorandum of discharge, and that the defendant Thompson might be decreed to execute a proper instrument of transfer to plaintiff.

The facts of the case, which are more fully stated in the judgment, were shortly, that the plaintiff, being the registered proprietor of land in Fitzroy, applied to the defendant Thompson for the loan of £30, which Thompson made him, less discount, taking his promissory note for £30, a deposit of his certificate of title, and a document which Thompson represented to be a security on the land, but which was, in fact, an absolute transfer of it to Thompson. Thompson, unknown to the plaintiff, registered the transfer and obtained a certificate of title to himself, and then mortgaged the land for £400 to the defendant Johnson. On the plaintiff's promissory note becoming due he offered payment to Thompson on return of the plaintiff's certificate of title, but was from time to time put off with excuses as to the production and return of his certificate of title, and eventually discovered the fraud, and instituted this suit. The land was all along in the possession of a tenant of the plaintiff, who down to the time of the suit paid rent to the plaintiff. The defendant Thompson answered, but did not appear at the hearing.

Mr. Webb, Q.C., and Mr. Topp for the plaintiff :— The plaintiff is entitled to the relief sought against the defendant Thompson, who does not appear. As to the other defendant Johnson, however, the facts do not show a case of simple mortgage to him, but a mere tabula in naufragio ; a security taken for a past, and almost a hopeless, debt.

If one of two innocent parties is to suffer, he who has given occasion to the transaction which necessitates that result should [*149] suffer. If Johnson's mortgage be now set aside, he will be no worse off than he was before it was executed, inasmuch as he advanced on it only as much as he received back in payment of an antecedent debt.

The circumstances of this case show fraud by Thompson which is excepted by Sec. 49 of the "Transfer of Land Statute" (No. 301). That means fraud on the part of either vendor or purchaser : Chomley v. Firebrace,[1] a

[1] 5 V. L. R. (E.) 57.

fraud in any person whereby the owner is deprived of his estate. [Mr. Justice Molesworth :—Is there not some provision whereby the fund would be responsible for passing a forgery, by which an estate might be transferred?] There might be an action for damages against the registrar (Sec. 146), but if Thompson, as intended mortgagee, is to be regarded as a trustee for Cullen, the fund could not be made liable : Sec. 151.

Further the plaintiff has been in continuous occupation of the land by his tenant, and in adverse possession by him against Thompson as owner, though not as mortgagee : Robertson v. Keith,[2] Staughton v. Brown ;[3] Colonial Bank v. Roache ;[4] and by Sec. 49 the certificate of title is made subject "to any rights subsisting under any adverse possession." Under the circumstances, Johnson had constructive notice of the plaintiff's rights. He was put on inquiry, and would be bound by all that he would thereby have learned : Daniels v. Davison ;[5] Taylor v. Stibbert ;[6] Smith v. Low ;[7] Jones v. Smith.[8] Had he inspected the property, or had a solicitor been employed, the tenancy would have been known, and, through it, the plaintiff's title. On these grounds, the plaintiff is entitled to redeem Johnson on the same terms as he would Thompson ; and if so, Johnson, who had resisted the plaintiff's right to redeem, should pay the costs of this suit. If the Court thinks otherwise, then plaintiff is entitled to redeem Johnson on paying what is due to him, having credit for the sums already paid, and Johnson should be ordered to reconvey upon payment by plaintiff or Thompson ; and if plaintiff pays [*150] he should have a right over, as against Thompson, to recover the amount of such payment from him.

2 1 V. R. Eq. 11.

3 1 V. L. R., L. 150.

4 1 V. R., L. 165.

5 16 Ves. 249.

6 2 Ves. J. 440.

7 1 Atk. 490.

8 1 Ha. 43, 65.

Mr. a'Beckett for the defendant Johnson :—The negligence of the plaintiff gave occasion for the fraud. Robertson v. Keith[9] confines the operation of Sec. 49 simply to the tenant or person in occupation of the land. It cannot be contended that the tenant protects not only his own interest, but also that of the person from whom he holds. The tenant's interest may stand, this defendant having no greater right against him than the plaintiff had. The questions of "notice" and "tenancy" are distinct, and cannot be argued together. Sec. 50 deals with notice, and Sec. 49 does not, but only refers to questions of tenancy.

There was no fraud on the part of Johnson. The plaintiff intended to mortgage the property, and did in fact execute a transfer, trusting to the defendant Thompson's honesty. Thompson was a trustee for the plaintiff. No question can arise as to the adequacy of the consideration given by this defendant for the mortgage. He is a purchaser for value without notice, and the question of value will not be considered by the Court : Bullock v. Sadleir ;[10] Thorndike v. Hunt.[11] If the mortgage to Johnson be set aside, he could not be replaced in statu quo with regard to the past debts which formed part of the consideration for that mortgage. The omission to employ a solicitor cannot be considered evidence of fraud. No inquiry by Johnson would have elicited from Thompson the fact of his fraud, and a solicitor if employed would not either, nor would any inquiry of the tenant. [Mr. Justice Molesworth :—Inquiry of the tenant would have elicited that he was paying rent as a weekly tenant to the plaintiff, which would have been inconsistent with Thompson's title, and would be constructive notice that Thompson's title was incomplete.] A purchaser is not bound to inquire of the tenant, his landlord's title ; he may purchase subject to his tenancy, whatever it may be. [*151]

[9] 1 V. R. Eq. 11.

[10] Amb. 764.

[11] 3 De G. & J. 563, 570.

Mr. Webb, in reply :—Under the statute, in cases of fraud by anyone, whether vendor or purchaser, the purchaser is not protected from inquiry. [Mr. Justice Molesworth :—In Chomley v. Firebrace,[12] the fraud was in the transaction between Murphy and the defendants, but here it is in a transaction anterior to that with Johnson. According to your argument, if the property went through a long series of transfers after Thompson's fraudulent dealing with it, the plaintiff could impeach them all.] We merely say, that in such case, the protection of the Act is taken away, and the parties are remitted to their position before the Act. Then, in relying upon the defence of purchaser for value without notice, the questions of inquiry and constructive notice would arise ; and the defendant cannot, in such case, rely solely upon the indefeasible nature of the certificate under the Act.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

The plaintiff in this action is Mr. James Cullen. The defendants are Mr. James William Thompson and Mr. John Gull Johnson. The plaintiff was the registered proprietor, under the "Transfer of Land Statute," of a piece of land, house and buildings in King William street, Fitzroy, and wanting a loan of £30 for three months upon the security of it, about 16th April, 1878, applied to Thompson, who agreed to lend it, and did advance £27 10s., making deduction for interest, etc., taking plaintiff's note for £30, and inducing plaintiff to sign a document, which he supposed to be a security for £30, but really was an assignment of his title in the land and of the certificate. Armed with this, Thompson, on the 30th April, had himself registered and obtained a certificate as proprietor, and on 12th July mortgaged the land, etc., to the defendant Johnson as for £400.

Plaintiff endeavored to pay the £30 when it fell due, and to take up his note and security. Thompson put

[12] 5 V. L. R. (E.) 57.

him off by various untruths and evasions until the 12th November, when by search at the registry office the fraud was detected. The premises before 16th April were in possession of a weekly tenant of the plaintiff, and have since so remained ; and if I were to deal with [*152] the case irrespective of the Act No. 301, I would say that Johnson should be deemed to have notice that the land was in the possession of the tenant, through it that the plaintiff was receiving the rents, through it to have inquired the plaintiff's rights, and discovered the want of title of Thompson. But Johnson alleges that he is protected from this kind of constructive notice by the Act No. 301.

Johnson's version of his and his firm's dealings with Thompson is, that they had existed ten or twelve years, the firm discounting bills for, sometimes exchanging cheques, making loans, taking mortgages from Thompson ; that on the evening of 9th May, 1878, Thompson came to borrow £50 for a few days, which he lent, exchanging cheques, that he made a similar advance on the 18th of £50 ; that he had before discounted a bill for him—£47 15s., which was dishonoured at maturity ; that on 21st May another bill which the firm had discounted was dishonoured ; that Thompson had before told him that he had purchased in King William street, and asked if Johnson would lend his firm's or trust money on it ; that he wanted a loan of £500 on this property ; that on the 10th June Thompson called and he pressed him for payment, and that Thompson left the certificate of title as security. Another bill fell due. That on 12th July Thompson called again, and he pressed for payment ; that Thompson spoke of getting a loan of £500 on mortgage, and that he proposed to lend £400 to be applied partly in payment of past debts ; and at last they agreed, and the mortgage was then and there executed for £400 ; that the amount was made up for principal and interest, as to which he gave details and produced vouchers making the debt, £400, short by £99 5s. 4d., for which he gave Thompson a cheque ; that Thompson afterwards paid him £100, 12th November, on account of the mortgage. On his cross-examination,

Johnson admitted that the transaction was completed all at once, without any examination or valuation of the property. Johnson's partner stated that he was present, and took part in the dealing, and knew the locality of the premises well.

A previous debt, however bad as to prospect of recovery, and a further advance, are good considerations for a mortgage. Plain [*153] tiff has not tried in any way to contradict Johnson's statement of the transaction, or sought any inquiry as to his being chargeable with participation in Thompson's fraud, so I think I should treat the mortgage as good against him. The Act No. 301, Sec. 49, would make Thompson's title as proprietor good against plaintiff's title, except in case of fraud, and I would say it was as to him a case of fraud. Besides, part of the same section would protect the occupying tenant against Thompson as to her own interest, but not as to her landlord's.

Then Sec. 50 says that, except in the case of fraud, no person taking a mortgage from the proprietor of any registered land shall be required to inquire the circumstances under, or the consideration for, which such proprietor, or any previous proprietor, was registered or shall be affected by notice, actual or constructive, of any trust or unregistered interest, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud. This seems to me to protect Johnson from plaintiff's interest. The whole policy of the Act would be frustrated if "except in the case of fraud" was held to mean or include fraud of the conveying party in acquiring title. In a recent case of Chomley v. Firebrace,[13] the Full Court held, as to a conveyance by a person who was agent of both parties to his conveyance, that his fraud prevented the application of the Act, that the fraudulent conveyance was ineffectual. But to decide for the plaintiff in this case against Johnson would be to say that a person innocently taking from another, having fraudulently acquired, is to be defeated.

[13] 5 V. L. R. (E.) 57.

As between plaintiff and Johnson, I shall direct the ordinary account of what is due Johnson on account of the mortgage of 12th July, 1878, and that Thompson pay the amount thereof as the Master may find; that upon payment of it and interest within six months of Master's certificate by the plaintiff or Thompson, and of his costs of suit, Johnson shall execute a memorandum under the Act No. 301 of discharge of the mortgage, and Thompson shall grant a transfer of the land to the plaintiff; that in the event of the plaintiff paying the debt and costs or any part thereof, Thompson shall forthwith pay him the same, deducting the sum [*154] of £30 in bill mentioned. Order the defendant Thompson forthwith to pay the plaintiff his costs of suit when taxed and ascertained. Refer to tax above costs of the plaintiff and Johnson. Direct that in default of payment to the defendant Johnson within the time aforesaid, this bill be dismissed with costs as to him. Liberty to apply. The account seems so far settled as to what is due Johnson, that I might probably make the decree for a calculated sum without reference, but I must make a reference in order to bind Thompson.

Solicitors for the plaintiff :—Gillot & Snowden.

Solicitor for the defendant Johnson :—Braham.

VICTORIA, 1879.—MOLESWORTH, J.] [5 V. L. R. (E.) 38.

GILES v. LESSER.

"Transfer of Land Statute" (No. 301), ss. 106, 107—Registration of fi. fa.—Sale by sheriff—Official assignee not a purchaser for value.

Sec. 106 of the "Transfer of Land Statute" (No. 301), does not avoid a sale by fi. fa. as to rights of a debtor; but only as between a purchaser for value from the debtor and a purchaser from the sheriff.

Therefore, where the official assignee of a debtor filed his bill against purchasers for value from the sheriff under fi. fa. to set

the sale aside, upon the ground that though the fi. fa had been duly served on the registrar the entry of the transfer had not been made within three months thereafter, the bill was dismissed with costs.

The United Hand-in-Hand Co. v. National Bank [2 V. L. R. Eq. 206] followed.

Bill by Robert Giles, assignee of the estate of George Nicklen, against Abraham Lesser, Louis Lesser, and Richard Gibbs, Registrar of Titles. [*39]

On the 8th November, 1875, Nicklen obtained a lease under the "Land Act, 1869," Sec. 20, for seven years, of certain Crown lands in the county of Dundas, with the right to acquire the fee. On the 3rd January, 1877, Nicklen, with the consent of the Governor in Council, mortgaged the lands to the defendants, A. and L. Lesser. On the 6th January, 1877, a writ of fi. fa. was issued in a suit of McLean v. Nicklen and subsequently cancelled; and upon the 10th July following, a new writ of fi. fa. was issued, and a copy thereof, with a statement of the land thereby affected, served upon the Registrar of Titles, and by him entered in the register book, in accordance with Sec. 106 of the "Transfer of Land Statute," and such writ was lodged at the sheriff's office on the 11th July. On the 18th September, Nicklen's interest in the land was sold by the sheriff, under the writ, to W. J. Meek, who re-sold shortly after to the defendants Lesser. On the 4th October the sheriff, at the request and by the direction of Meek, signed a transfer of the land to the defendants, reciting the writ of the 6th January, 1877, instead of that of 10th July. The transfer was lodged for registration on the 9th October, but was refused for the want of consent of the Governor in Council. Before that could be obtained, the three months from the service on the registrar of the fi. fa. had expired; and on the 22nd October another copy of the fi. fa. of the 10th July and a statement dated 22nd October was served on the registrar. The Governor's consent was obtained 23rd October and endorsed upon the lease; and upon the 27th October the transfer was duly lodged at the Titles Office. On the

29th October Nicklen's estate was placed under sequestration.

The Titles Office refused to register the transfer, upon the ground that the writ and statement lodged 22nd October required the Governor's consent to its registration; and on the 25th April, 1878, the transfer was withdrawn, but re-lodged on the next day. The Office of Titles thereupon treated the application as an entirely new one, affecting an insolvent's property, and sent a notice thereof to his assignee, who lodged a caveat under Sec. 107 of the "Transfer of Land Statute," and instituted this suit to restrain the defendants, Lessers, and Gibbs, Registrar of Titles, from registering the transfer. The bill was framed upon the [*40] erroneous supposition that the sale by the sheriff was subsequent to the insolvency of Nicklen, and charged that by such insolvency the equity of redemption became vested in the plaintiff, and that the sale by the sheriff was null and void. Upon the admissions and evidence, however, it appeared that the facts were as hereinbefore stated.

The suit was undefended by Gibbs.

Mr. a'Beckett for the plaintiff:—The lodgement on the 26th April, 1878, was not made within the three months required by Sec. 106 of the "Transfer of Land Statute;" and therefore the writ ceased to bind the land, and the defendants have no title under it.

Mr. Lawes for the defendants:—The case now made at the bar is not raised by the bill. The assignee can have no greater rights than the debtor; and the debtor, if he had not been insolvent, could not have disputed the defendants' title. Section 106 is for the protection of a purchaser from the debtor, and not of the debtor himself; and "ceasing to bind the land" means ceasing to give priority under the execution: Registrar of Titles v. Patterson.[1]

It has not been argued that the assignee of the debtor is a purchaser for valuable consideration, and unless he is, the plaintiff has no right.

[1] 2 Ap. Ca. 110.

The lodgement of the 10th July should have been received, and the purchaser is not to be prejudiced by the refusal of the office because of the provision in the lease requiring the consent of the Governor in Council to the transfer. Registration is not necessary to protect the sale against the execution debtor, it only leaves the purchaser open to have the purchase defeated by the act of the debtor: United Hand-in-Hand Company v. National Bank.[2]

Mr. a'Beckett in reply:—The proviso to Sec. 106 has no reference to the objection to the transfer in this case. It relates only to the lodgement of [*41] notice of the writ at the office before sale. The middle part of the section refers to the lodgement of the copy writ. "Every such writ" in the section means every writ whether lodged or not.

If the Titles Office is at fault, the defendants have their remedy against it.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH:—

The plaintiff in this suit is Mr. Giles, the official assignee of Mr. Nicklen, an insolvent; the defendants, Messrs. Lesser, persons claiming as assignees of a purchaser under a sheriff's sale of the insolvent's interest in land.

The bill seeks to restrain the defendants from obtaining, and the Registrar of Titles from giving, registration of the transfer from the sheriff. The bill was framed under the idea that the sequestration was before the sale; it really was after. But I have had a new case argued before me, that though the fieri facias was duly served on the registrar under the "Transfer of Land Statute" (No. 301), Sec. 106, the transfer was not left for entry under that section within three months. I adhere to the opinion I expressed in United Hand-in-Hand Company v. National Bank,[2] that the section does

2 2 V. L. R. Eq. 206, 218.

not avoid a sale by fieri facias as to the rights of the debtor, but only as between a purchaser for value from the debtor and a purchaser from the sheriff. An official assignee is not a purchaser for value, and the provisions for the entry of the transfer within three months I think to be merely a restriction of the protection afforded by the service of the fieri facias. In this case, the transfer was left for entry within three months of the service, and, in consequence of a difficulty as to the necessity of the approval of the Governor in Council to the transfer, the matter was delayed, and the transfer withdrawn; and then, after the three months expired, again brought to the office. I have heard argument as to whether this had relation to the first lodgement. It is not necessary, according to my view, to express an opinion on this. I dismiss the bill with costs.

Solicitor for the plaintiff:—Plunkett.
Solicitor for the defendants, Lessers :—Fishley.

SUPREME COURT, VICTORIA, 1879.] 5 V. L. R. (L.) 53.

In re "TRANSFER OF LAND STATUTE," *Ex parte* BEISSEL.

"Transfer of Land Statute" (No. 301)—Amending Act (No. 610), s. 2—Certificate of title—Easement—Registration.

In bringing under the "Transfer of Land Statute" land with an easement appurtenant, the applicant cannot have such easement inserted in his certificate of title against the will of the proprietor of the servient tenement, though the latter is already registered under the Act.

Motion upon notice for a rule to set aside an order made by Stawell, C.J., on 7th February, 1879, under 15th Vic. No. 10, [*54] Sec. 19, and drawn up and dated on 8th February, 1879, exercising the powers of the Court under the "Transfer of Land Statute" (No. 301), Sec. 24, to restrain the Registrar of Titles until further order from bringing under the operation of that statute

certain easements over certain land comprised and referred to in the caveat of the Metropolitan Permanent Building and Investment Society (dated 8th January, 1879) claiming an estate in fee simple in possession on the land, over which Beissel claimed to have endorsed upon his certificate of title an easement appurtenant to his land.

The grounds upon which the present application was made were :—

(1) That the learned judge had no jurisdiction to make such order, the same not being in any suit in Equity or action at law; (2) That the caveator did not, within the requisite time, take any proceedings in a court of competent jurisdiction; (3) That the summons, upon which the said order was made, was not served upon the said Charles Beissel, nor upon any person representing him, nor left at his place of residence or place of business; (4) That Beissel had no opportunity of being heard upon the said summons, or against the making of the said order; (5) That the said summons was not served upon the Registrar of Titles until after 3 p.m. (the hour at which the office of Titles closes) on 6th February; (6) That the said order was not made until after the expiration of one month from the receipt of the aforesaid caveat by the Registrar of Titles, and the said caveat had lapsed, under the provisions of Sec. 24 of the statute; (7) That the said order is bad in law; (8) That the applicant is entitled to be registered as proprietor of the easements over the pieces of lands comprised or referred to in the said caveat.

The affidavits in answer stated that the summons (issued 6th February) upon which the order had been made was taken by a clerk of the caveator's solicitors to the office of the Registrar of Titles before 3 p. m. on 6th February, but, as the registrar was engaged at the moment, the clerk had to wait until a few minutes past 3 p.m., and then served the summons upon the registrar; that the only address given in the application of Beissel was Swan street, Richmond; that no notice was given of any change of solicitor, or that Henry Westley (who had acted for Beissel in two actions of ejectment brought against him by the caveators as to the land referred to in the caveat) was not acting for Beissel in the matter of the application, until after service of the summons on Westley, although Westley was aware that the society had entered the caveat; that the delay in making the application for the order was in consequence of the absence [*55] of counsel from Melbourne during the vacation. The land of the caveator had pre-

viously been brought under the "Transfer of Land Statute," and was registered thereunder, and a right of way over it had been granted by deed, by a former proprietor of the whole of the land, to Beissel's predecessor in title, long prior to the registration of the caveator's land, but such easement was not endorsed on the caveator's certificate of title. Beissel was bringing his land under the Act, and claimed to have this easement inserted in the certificate of title to be issued to him.

Worthington for the motion :—On the facts appearing on the affidavits, it is submitted that the order cannot stand. There was no proceeding taken in any Court of competent jurisdiction ; and the month lapsed. The Court cannot grant what is virtually an injunction, unless some action or suit has been instituted ; Sec. 24 does not give the Court any power to make such order independently of any suit. It was held in Re Power[1] that a Judge in Chambers could not make such an order, and that an action or suit was necessary. The institution of proceedings is essential to both alternatives mentioned in Sec. 24 ; proceedings must be instituted in which the defendant may maintain his title, and then either notice thereof must be served on the registrar, or an injunction or order of the Court may be obtained. [Stawell, C.J.—The order in question is only an interim order ; it does not conclude the title.] This interpretation is borne out by the words "within that time" not being repeated as to obtaining the order, though they undoubtedly apply to it. The applicant was not served with notice of the application for the restraining order, though the summons calls upon him also to show cause ; this is necessary for the protection of his interest, which the registrar is not concerned in defending, his function being only ministerial.

On the merits, the land of the applicant abuts on land of the caveator, over which the applicant has an undisputed right of road granted to him by deed. Surely he has a right to have this easement endorsed upon his certificate of title. The servient tenement is already

[1] 6 W. W. & a'B, L. 81.

registered under the Act. The title deeds [*56] which show the grants of the easement will be gone from the owner of the dominant tenement when the certificate issues, for they have to be deposited in the office. He could not go behind his certificate in any action of trespass, without foregoing its conclusiveness under Secs. 47-49 ; and he has no assurance of being enabled to produce the deeds when necessary. The easement is appurtenant to the land—a part of it. Rights of easements are frequently endorsed upon the certificate of title of the dominant tenement ; and no injury can be done to the owner of the servient tenement. This is sanctioned by the Amending Act No. 610 ; that Act meets the decision in Ex parte Cunningham,[2] which is also distinguishable in that there the servient tenement was not registered under the Act. The applicant proposes to insert the words, "together with a right of way over," etc. [Stawell, C.J.—The Act does not give a right to insert the easement in the certificate of the dominant tenement, but merely gives effect to such insertion when it has been made by consent or otherwise. How is the registrar to deal with land not really before him on your application ?] There is no real necessity for putting the easement upon the certificate of the servient tenement as Sec. 49 makes it subject to all existing easements.

a'Beckett and Williams, for the caveators, showed cause in the first instance—as to the service of the notice —it was served upon the solicitor who had been acting for the applicant, and was presumed to be still acting for him. But notice to the registrar is sufficient ; he is the person to be restrained ; and the Act does not require an applicant to register an address at which he may be served. The objection as to the jurisdiction to issue the order is concluded by Ex parte Gunn.[3] The Act No. 610 is concerned only with evidence ; it does not prescribe how an easement is to be got upon the certificate of the dominant tenement. The only mode,

[2] 3 V. L. R., L. 199.

[3] 3 V. L. R., L. 36.

under Act No. 301, of registering an easement is under Sec. 64, and that deals only with the servient tenement. The applicant is not prevented from using his deeds, after registration, in establishing his easement; the Act (Sec. 27) provides for a return of the title deeds to the applicant, if they relate to [*57] other land, as they do when they contain a grant of an easement over other land.

Worthington, in reply:—Section 64 relates only to the creation of an easement by the owners of both dominant and servient tenements, and does not affect the rights of persons not coming within it. The applicant seeks only to perpetuate his undisputed right. The policy of the Act is that there shall be no necessity for reverting to the previous title deeds for any purpose in respect of the land registered; otherwise there would be but little simplification of title. The whole title is to appear in the certificate, which limits the rights of the owner. [Stawell, C.J.—The word "land," under the Act, includes easements.]

Cur. adv. vult.

Per Curiam.—Motion on notice to set aside an order made in Chambers, under Sec. 19 of the Act 15 Vic. No. 10, directing the Registrar of Titles to abstain from bringing under the operation of the "Transfer of Land Statute" the pieces of land mentioned in the caveat. There was no appearance for the Registrar of Titles either in this or the previous application. The owner of the lands was the owner of the dominant tenement, having a right of way over other lands. The servient tenement had been brought under the statute, and it was contended for the owner of the dominant tenement, that he had a right to have marked on his certificate of title, and put on the records of the office, that he was entitled to this right of way as appurtenant to his land.

It was objected, in the first place, that the Court has no jurisdiction to make such an order, unless in cases where a suit has been instituted in equity or an action

brought at law. This objection has, however, been already fully considered in previous cases, and it has been held that the Court possesses jurisdiction to restrain the registrar from registering certificates of title. Sec. 24 of the "Transfer of Land Statute," under which such orders are made, may not be free from doubt; but no reason has been adduced for departing from the decisions previously [*58] pronounced, that the Court has jurisdiction to interfere and prevent an injustice being done, whether a suit has been instituted in equity or an action brought at law, or not.

Then arises the question whether the owner of the dominant tenement may have marked on his certificate of title the easement that he claims over the adjoining servient tenement. It has already been decided, in Ex parte Cunningham,[4] that this cannot be done. The objection in that case, it is said, was that the land sought to be affected had not been brought under the "Transfer of Land Statute;" but that in this case, as the servient tenement was already under the Act, the provisions of the Act could be made applicable to it. Section 64 contains the only provision in that Act for the creation of easements, and that does not apply to the registration of such easements on the certificate relating to the dominant tenement. Since that decision was given, the Legislature has passed an Amending Act, No. 610, which relates apparently only to evidence. Section 2[5] enacts that a statement on a certificate of title, that the person named is entitled to an easement, is to be conclusive evidence as to his being so entitled. It goes no further, and its silence impliedly recognises that the decision in Ex parte Cunningham[4] correctly interpreted the language of the Legislature in the origi-

[4] 3 V. L. R., L. 199.

[5] No. 610, Sec. 2:—"Whenever any certificate of title or any duplicate thereof, either already registered or issued, or hereafter to be registered or issued, under any of the provisions or otherwise under the operation of the "Transfer of Land Statute," shall contain any statement to the effect that the person named in the certificate is entitled to any easement therein specified, such statement shall be received in all Courts of law and equity as conclusive evidence that he is so entitled."

nal Act. Section 47 of the original Act provides that a certificate is to be conclusive evidence of the title of the person named in the certificate. It still leaves open the way in which the entry of an easement is to be made on the certificate of title. It was further objected, on behalf of the applicant, that he had received no notice of the summons to restrain the Registrar of Titles from making the registration, and, therefore, that the order made could not be supported. But the Act only requires that the summons should be served upon the Registrar, and not upon any other person, and the maxim, utile per inutile non vitiatur [*59] applies. The rule to set aside the order restraining the Registrar of Titles from registering the right of way must therefore be refused.

Rule refused.[6]

Attorney for the applicant :—Westley.
Attorneys for the respondent :—Malleson, England & Stewart.

VICTORIA, 1868, MOLESWORTH, J.] [5 W. W. & a'B. (E.) 125.

HERVEY v. INGLIS.

In a mortgage under "The Transfer of Land Statute," upon default in payment of interest although the time for payment of the principal has not arrived, the mortgagee can only be stayed from selling by payment or tender of the whole amount of principal and interest.

This was a suit by Mr. Matthew Hervey, a mortgagor, against Messrs. Inglis and Milne, the mortgagees (the latter of whom was out of the jurisdiction, and was represented by his attorney, Mr. G. N. Turner), to restrain the exercise of a power of sale in the mortgage deed, and also further proceedings of an action of ejectment.

[6] Subsequently to this judgment being pronounced, the attention of the Court was called to Sec. 4 of the Amending Act (No. 610), which it was said was passed to remedy the omission in the original enactment; and the Court observed that that section seemed to require further consideration, should the point again arise; although apparently the object for which it was said to have been inserted might have been attained by language admitting of less doubt than its present terms suggested.

The plaintiff executed the mortgage in question under the "Transfer of Land Statute," in December, 1886, to secure the sum of £4,500, repayable on the 27th October, 1869, with interest at the rate of 10 per cent., payable quarterly, reducible to 8 per cent. if paid on, or within ten days after, the respective quarterly days of payment. There was a covenant to insure in the names of the mortgagees. On the 13th of March, 1868, a notice was served by Turner, as attorney of Milne, requiring the plaintiff to pay the sum of £225, the interest for two quarters, and also to pay the sum of £12 5s. for insurance, which had been paid by the defendants; there being no reference in such notice to the principal. Plaintiff was at the same time served with a writ in ejectment at the suit of defendants; but no intimation was given of any intention to sell. On the 20th April the plaintiff accidentally discovered that the defendants had instructed Mr. Gemmell, an auctioneer, to advertise the mortgaged property for sale, and that it had been advertised accordingly. On the same day he saw Turner, and requested him to revoke the instructions for the sale. He promised to the plaintiff that the advertisement should not be inserted on condition that he would call next day, and pay the amount of interest and insurance premium. On the 21st April, plaintiff went to Turner's office, in the afternoon, to pay the money, but did not see him, he having left for the day at 2 p.m. He subsequently, on the same day, tendered a cheque to one John Munro (there being [*126] funds at the bank to meet it) a clerk of Turner's, and also to Mr. Gemmell, and to Mr. Hellins, solicitor for Inglis, who also declined to receive it. On the 22nd of April, Mr. Sedgefield, plaintiff's solicitor, tendered to Turner the amount of interest and premium in notes and coin, but it was refused, unless the principal of £4,500 was also paid. The advertisement of sale was withdrawn, but was afterwards again inserted. The property, it was alleged by the plaintiff, was of much greater value than the amount of the mortgage, and ample security for the mortgaged debt.

The only statement of fact in the plaintiff's bill and affidavit, traversed by the defendants' affidavits, was with reference to the promise given by Turner to withdraw the advertisement of the sale of the land, if the interest and insurance premium were paid next day. Turner, in his affidavit, stated that he merely promised to withdraw the advertisement for a day, without any condition; also, that the plaintiff had had the land divided into lots, and was having them sold, and that such division of the property would injure its value.

The case now came before the Court upon a motion for an injunction to restrain the sale and the ejectment action.

Mr. J. W. Stephen and Mr. Holroyd for the plaintiff:—There are singularly few decisions in the English Courts bearing upon the question now before the Court, which may be accounted for by the fact that mortgages in England are invariably drawn, making the principal due at the same time the first interest is made payable. Here, mortgages are drawn for a long term of years, making the principal due at a certain time. The only case bearing on the point is Edwards v. Martin,[1] where it was held that the non-payment of interest entitled the mortgagee to foreclose, although the time for payment of the principal had not arrived.

[*127] The whole system of mortgaging is reversed by the "Transfer of Land Statute," Sec. 84.[2] By Sec. 85 power is given to the mortgagee to sell the land if the default continue for one month after notice. It is important to observe the distinction implied by the use of the word "owing" in Sec. 84. The interest was due when the time for its payment arrived; the principal was owing, but not due till the time fixed for its pay-

[1] 25 L. J. Ch. 284.

[2] "In case default be made in payment of the principal sum, interest, or annuity secured, or any part thereof respectively . . . and such default be continued for one month, or for such other period of time as may be expressly fixed, the mortgagee . . . may serve on the mortgagor . . . notice in writing to pay the money owing on such mortgage, or to perform and observe the aforesaid covenants," etc

ment came round. By that section the defendants were bound to give the plaintiff notice of what was "owing" on the mortgage; but they have not done that, for they have simply given notice of what was "due." They therefore failed to comply with the terms of the Act. The offer of Hervey to pay the money both on the 21st and 22nd of April, although somewhat more than a month after the notice, constitutes an equitable reason for restraining the defendants from carrying out this sale. Reference was also made to Jenkins v. Jones,[3] Rhodes v. Buckland.[4]

Mr. Forster and Mr. a'Beckett for the defendants:—The whole legal status and equitable interest of mortgagees are swept away by the Act, and only certain remedies are left to them in default. Under the terms of Sec. 84, there was no necessity, in giving notice of the default in the interest, that the defendants should intimate that they meant to call up the principal. They were simply bound to intimate the covenants which had been broken, and, at the expiration of a month from the service, they could claim, not only the interest, but the principal. The power of the mortgagees to exercise the right of sale accrued from the violation of the covenants on behalf of the mortgagor; and they, seeing that there would be some difficulty in [*128] obtaining the interest, had resolved to exercise the right. There is no precedent to justify the Court in interfering with the rights of a mortgagee, unless the mortgagor tender, not only the interest, but the principal.

Mr. J. W. Stephen in reply.

Cur. adv. vult.

Mr. J. W. Stephen, for the plaintiff, asked if His Honour was prepared to give judgment? The sale would take place on the following day, and unless judgment was given before then, the injunction would be of no avail.

Mr. Justice Molesworth:—I have considered the case

[3] 2 Giff. 99.
[4] 16 Beav. 212.

in some degree, and my opinion, so far as it is formed, is that, as regards the section relating to mortgagees, they are not entitled to proceed to a sale until the expiration of a month from the date of the notice of default.

There is no doubt, however, that mortgagees can only sell for principal and interest both. They can do no more and no less. The question then is—what would be sufficient to warrant the interference of the Court? I think the Court should only interfere where an offer has been made of the principal and interest—where the mortgagee could get all without a sale that he could get with a sale. In this way the Court would interfere to prevent a vexatious exercise of the right of sale, for if a mortgagee was offered all, to sell would be vexatious. My present impression is that I ought to refuse the injunction; costs to be costs in the cause. I cannot say, of course, what effect the pendency of the suit may have upon the sale.

Motion refused; costs to be costs in the cause.

SUPREME COURT, VICTORIA, 1867.] [5 W. W. & a'B. (L.) 55.

In re "TRANSFER OF LAND STATUTE," *Ex parte* JOHNSON *in re* WHYTE.

The owner of certain land granted by deed to an adjoining owner a right of way over a certain portion of his land in consideration of a certain sum. Upon proceeding to register the grantor as proprietor under the Act No. 301, the grantee lodged a caveat in respect of his right of way. Upon a summons (referred by a judge to the Court) to show cause why the caveat should not be removed,

Held, that only easements appurtenant to the land registered can be entered upon the register; and that this was not such an easement, but merely a way in gross, and application to remove the caveat allowed.

Summons taken out before Stawell, C.J., by him referred to the Full Court, and argued Trinity Term, 1867.

The summons was by Johnson, an applicant for registration under the "Transfer of Land Statute," calling

on Whyte to shew cause why a caveat he had lodged against any transfer or dealing by the applicant, in respect of certain land of which the applicant was proprietor, should not be removed. Johnson and Whyte being the owners of adjoining property entered into the following agreement under seal :—

"Emerald Hill, April 6th, 1865.

"Memo. of agreement whereby I, the undersigned E. "Johnson, in consideration of having this day received "from William Whyte the sum of £6, do hereby for my-"self, administrators, heirs or assigns, grant unto said "William Whyte, his heirs and assigns, the use of a "certain right of way reserved out of allotment No. 1, "Sec. 37 B, parish of South Melbourne, said right of way "being ten feet wide, and entering from Anderson street "and running along the southern portion of the said "allotment to lot 2, to pass and repass over and along "the said road or right of way with or without horses "or other animals, carts or other carriages, into and out "of said road or right of way or any part thereof.

"In witness whereof I have the day and year first "above written affixed my hand and seal.

"£6—Received from W. Whyte six pounds consideration money." (Signed and sealed.)

In his affidavit the applicant stated that he had tendered to Whyte the said sum of £6, and was still ready and willing to return it to him.

[*56] J. W. Stephen for the applicant, in support of the summons :—The right claimed is not an easement appurtenant to any land ; no piece of land of the caveator is named in the agreement, for the benefit of which it was granted. What passed thereunder was a mere right in gross, and the "Transfer of Land Statute" (No. 301), does not authorise the registration of any such rights by way of encumbrance upon the title. By Sec. 42 no instrument, until registered, is to be effectual to render the land liable to any charge, and by Sec. 4 the word "instrument" is made to include "a transfer, lease, mortgage, charge, and creation of an easement." The

registered proprietor holds the land absolutely free from all other encumbrances than those upon the register, Sec. 49. The only easements recognized by the Act are those appurtenant to land registered "together with a right of carriage way," etc., Sec. 64. Sec. 116, providing for the right to lodge a caveat, gives it only to a person claiming under any unregistered "instrument," or by devolution of law.

Holroyd for the caveator:—The grant created a charge upon the land. The interpretation of "instrument," in Sec. 4 speaks of the "creation of an easement," without confining it to an easement appurtenant to any land; and there may be easements in gross, the burden of which may run with the tenement over which they are claimed: Gale on Easements, 3rd Ed. p. 13, note. A dominant tenement is not necessary for the existence of an easement: Dyce v. Hay.[1] The reason of the thing is stronger in favour of registering a grant of an easement in gross, for if not registered there is nothing to indicate it, or to give notice to the grantee, upon an intended transfer of the servient tenement, that his right may be affected. While in case of an easement appurtenant, the owners or occupiers of the land contiguous (to the land of some of whom the easement would be appurtenant) would, at any [*57] rate, when the land was first brought under the Act, have notice sent them under Sec. 20, which would enable the grantee of the easement to protect his rights.

Cur. adv. vult.

Stawell, C.J. (after stating the facts):—The subject of this application involves difficult and intricate questions of law. The transaction is in no way a sale of any land; there is no dominant tenement, it is the mere grant of a right of way for a consideration, irrespective of land, or any transaction relating to land. The "Transfer of Land Statute" (No. 301) refers to the creation of easements, and the interpretation clause evidently means the word "land" to comprise easements and

[1] 1 Macq. H. L. 312, per Lord St. Leonards.

appurtenances appertaining to the land described, or reputed to be part thereof, or appurtenant thereto: in other words, easements appurtenant, and not in gross. A subsequent section confirms this view. Sec. 64 requires easements to be registered. "A memorial of any transfer or lease creating any easement over or upon or affecting any land under the operation of this Act shall be entered on the folium of the register book constituted by the grant or existing certificate of title of such land in addition to any other entry concerning such instrument required by this Act." In fact, it treats a lease creating an easement appurtenant as an encumbrance, and directs that that encumbrance shall be endorsed on the folium of the register book in the same way as any other encumbrance. Because the grantor, having granted that easement appurtenant, thereby confers a right on another person which may fairly be treated as an encumbrance on the land. Secs. 116 and 117 relate to caveats, and empower "any beneficiary or other person claiming any estate in land under the operation of this Act" to lodge a caveat forbidding the registration of any person as transferee, until notice is given to the caveator, or unless the transfer is made sub [*58] ject to his claim. Notice of this caveat is to be given to the proprietor, and the caveator may be called upon by the Court or a Judge to show cause why it should not be removed, and the Court or Judge is to make such order as may seem fit.

Large powers are here conferred on the Judge or Court. These words "any beneficiary or other person claiming to be interested," taken by themselves, enable any person having any conceivable estate or interest to lodge a caveat, and allow the matter to come before the Court. But these plenary powers are to be taken, we think, in conjunction with the object of the Act, which is to enable an owner to register land, and to create a clear estate, and not to allow encumbrances to appear on the register which ought not to be there. And the question is whether this is an easement which ought to appear on the register as against this land. An appur-

tenant easement must inhere in the land, and there ought to be a dominant and a servient tenement. We think that the right conferred by this document is not an appurtenant easement, if it can be properly described as an easement at all, about which I have some doubts.

An easement in gross is merely a personal contract between the grantor and the grantee. The case of Ackroyd v. Smith[2] is very decisive on the point; there, a right of way was admitted to have been granted for certain purposes over certain land, in the same words almost as in this case, and the land was assigned to another person ; that assignee, in an action of trespass, pleaded the assignment, and the original grantor filed a demurrer. Creswell, J., in giving the judgment of the Court, goes into the whole question, and considers the right a mere grant in gross. He says:[3] "If the right conferred by the deed set out was only to use the road for purposes connected with the occupation and enjoyment of the land conveyed, it does not [*59] justify the acts confessed by the plea. But if the grant was more ample, and extended to using the road for purposes unconnected with the enjoyment of the land, . . . it becomes necessary to decide whether the assignee of the land and appurtenances would be entitled to it. In the case Keppel v. Bailey,[4] the subject of covenants running with the land was fully considered by Lord Brougham, C. He says :—'The covenant (that is, such as will run with the land) must be of such a nature as to inhere in the land—to use the language of some cases; or it must concern the demised premises, and the mode of occupying them, as it is laid down in others ; it must be quodammodo annexed and appurtenant to them, as one authority has it ; or, as another says, it must both concern the thing demised, and tend to support it, and support the reversioner's estate.' If a way be granted in gross, it is personal only, and cannot be assigned."

2 10 C. B. 164.

3 At p. 187.

4 2 My. & K. 537.

We think that this right to Whyte was merely a way granted in gross, that it could not be assigned, and that it ought not to be registered. We are fortified in this view by a consideration of the 24th Vic. No. 112, Sec. 45, to which we have been referred. That Act goes a great deal further than the English law, and makes that which would be a way in gross, according to Ackroyd v. Smith,[5] a way appurtenant to the land. The present grantee (Whyte) is neither the owner nor purchaser of the land over a part of which a right of way is given. Two persons, independent owners, possess land; one gives £6, and the other gives a right of way over a piece of land in no way connected with any purchase, and the person to whom it is granted is not a sub-purchaser. No doubt, under the "Transfer of Land Statute," an easement may be registered; but this is not an easement, only a way in gross, which the Legislature never contemplated should be registered. We cannot make the conscience liable where the title is not liable.

[*60] We shall grant the application to remove the caveat. The point is a new one, and therefore we give no costs to either side.

Application granted. Caveat to be removed.

VICTORIA, 1867.—MOLESWORTH, J.]

[4 W. W. & a'B. (I. E. & M.) 18.

IN THE REAL ESTATE OF JOHN GOW, DECEASED.

Where a testator, although not devising the legal estate in his lands, gives his executor power to sell them, he does not die intestate as to such lands within the meaning of the "Transfer of Land Statute," and a rule to administer such lands will not be granted.

John Gow died in June, 1866, the proprietor of land under the "Transfer of Land Statute." His will, dated the 25th of June, 1864, was as follows:—

"I appoint Mr. William Craig, miner, Smythesdale or Scarsdale, my executor. In the event of my decease,

[5] 10 C. B. 164.

he is hereby requested to convert into cash all my property as soon as possible, with the exception of such things as will be specified underneath. The expenses attending my funeral and all claims against me, duly authenticated, to be paid. As all my relations, for anything I know to the contrary, are more or less prospering in the world, I send in another direction what might otherwise have been theirs. I bequeath to my executor, Mr. William Craig, one hundred pounds sterling (£100). I leave all my books to the Smythesdale Mechanics' Institute, and £50 besides. I leave to the Rev. William Henderson, Ballarat, my dressing case, as a mark of my esteem. I leave to the Rev. Duncan Fraser, Ballarat, my watch, writing desk, and telescope, as a mark of my regard. I place here what it was my intention to have mentioned earlier. My executor is to invest, in some well known insurance office £300 in the name of Ann Keith, my housekeeper, that she may derive a life annuity therefrom, not transferable, but payable only to herself. Whatever balance of cash there may be, after paying or meeting the above bequests, to be handed over as a donation to the hospital, Ballarat."

Mr. Craig, the executor, applied to the Commissioner of Titles, to be registered as devisee under the Act, but the commissioner refused the application, on the ground that the deceased had died intestate.

Mr. J. W. Stephen now moved on behalf of the executor for a rule to administer under the "Transfer of Land Statute."

Cur. adv. vult.

Mr. Justice Molesworth :—The testator had an evident intention to dispose of all his property ; and, although there is no direct devise of the lands passing the legal estate, the [*19] executor has, I think, power to sell them ; and the testator cannot be treated as having died intestate as to them, within the meaning of the Act. The beneficial interest is virtually disposed of, and the executor can transfer the legal estate. The application will, therefore, be refused.

VICTORIA, 1871.—MOLESWORTH, J.] [3 V. R. (E.) 1.

DAVIS AND OTHERS v. WEKEY AND OTHERS.

"Transfer of Land Statute"—Lease—Transfer—Fraud—Notice—Injunction.

The manager of a mining company procured the sale of its property under a fraudulent judgment, and became the purchaser. Part of the property consisted of a lease under the "Transfer of Land Statute," which was transferred to him, and by him to a purchaser, both transfers being registered on the same day. On bill to set aside the sale and restrain dealings with the lease by the second purchaser, injunction granted, the second purchaser having notice of the fraud of the first.

Observations on the words "except in the case of fraud" in Sec. 50 of the "Transfer of Land Statute," and as to dealings with a person entitled to be, but not being, registered as proprietor.

The immense power which the "Transfer of Land Statute" gives to a proprietor of completely barring clear equities presents a reason for Courts of Equity readily interfering by injunction.

Motion to dissolve an injunction granted as if ex parte under the circumstances stated ante, Vol. II. Eq. 172.

The bill was by shareholders in the Aladdin and Try Again United Gold Mining Company, Registered, to set aside a fraudulent judgment against the company, and sale of its property under it; and to remove [*2] the directors. It appeared from the affidavits that the defendant Wekey, the manager of the company, sued it for a debt not due, fraudulently prevented any defence to the action, and obtained judgment and execution, under which he caused the property of the company to be irregularly sold, and himself purchased at an undervalue in May, 1870. He and other defendants who had colluded with him were prosecuted and convicted for conspiring to defraud the company. Wekey kept possession of the property purchased, which comprised a mining lease registered under the provisions of the "Transfer of Land Statute." On the 20th September, 1871, the special bailiff executed a transfer of this lease to Wekey. On the same day Wekey executed a transfer to the defendant Ireland, and both transfers were registered on the same day. The bill charged that the

transfer to Ireland was without consideration; and that he was, in fact, a trustee for the other defendants, and had notice of the fraudulent conspiracy and of the circumstances under which the pretended sale took place. The defendant Ireland denied that he had purchased as a trustee, and stated that the purchase was made in August, 1871, in consideration of past advances made by him to Wekey, and of his acceptance to Wekey for £530. That he was aware that Wekey had purchased under a judgment against the company impeached by the company, but that the company had, by resolution, agreed to take no proceedings to set the sale aside. It appeared that Ireland's acceptance had not been paid, but that judgment had been obtained on it. Wekey filed an affidavit in support of the statement made by the defendant Ireland. The plaintiffs moved for and obtained an injunction to restrain the defendant Ireland from transferring or otherwise dealing with the mining lease of which he was registered as the proprietor under the "Transfer of Land Statute," which injunction he now moved to dissolve.

Mr. Holroyd and Mr. a'Beckett for the motion:—The defendant Ireland is a purchaser and registered proprietor under the "Transfer of Land Statute." The bill does not charge fraud against him, and under Sec. 49 of the statute, fraud is the only qualification of the title, as shewn by the certificate, on which his title can be impeached. The defendants charge notice only, and under Sec. 50 notice is immaterial. The knowledge of an unregistered interest cannot be imputed as fraud, and is no bar to a dealing with the proprietor. The plaintiffs have no right to complain, as they have allowed the defendant Wekey to remain legally as well as ostensibly entitled to the property; and take no steps until a third person intervenes as against whom they [*3] have no rights. The bill treats Ireland as a trustee for the other defendants, and asks for relief against him on that basis. On the admitted facts this ground cannot be sustained, and the plaintiffs' equity fails.

Mr. J. W. Stephen, for the plaintiffs, contra:—It is

not necessary to charge fraud when facts shewing fraud are distinctly alleged. The bill charges that the defendant Ireland knew of the fraud of the other defendants and dealt with one of them as to the fruits of it. This is sufficient allegation of fraud as to him. At the time of the contract alleged, Wekey was not a registered proprietor, and the contract was therefore not a dealing with a proprietor within the protection of Sec. 50. The transfers to and from Wekey took effect at the same time, and Ireland is subject to the plaintiffs' claims as to the land as fully as Wekey was. It is admitted that if Ireland transfers the plaintiffs will be unable to enforce any rights as against the land or the transferees, and the injury would be irreparable. The plaintiffs are entitled to protection against any dealing having such an effect.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

This is a suit of Mr. Davis and others, shareholders in the Aladdin and Try Again Gold Mining Company, Registered, against Messrs. Wekey, Keogh, Capes and Ireland, to set aside the title of Wekey as purchaser of property of this company under a sheriff's sale, and the title of Ireland as derived from Wekey. The immediate motive of the suit was to stop measures taken by Ireland to obtain a title under the "Transfer of Land Statute." An injunction was obtained on the 29th November against Ireland transferring, leasing, or otherwise dealing with or encumbering the same, which may be regarded as nearly ex parte, as the answering affidavits were not filed in time to be used. I have now to deal with an application, heard 13th December, to discharge the injunction.

The plaintiffs' case by affidavits as to Wekey (which, though he has made affidavits, he does not attempt to controvert), is that he was manager and director of the company in question ; and colluded with other directors, forming a majority, to obtain a recognition from them of his being a creditor—by an acceptance of £104

12s.—when he was [*4] really a debtor of the company, to bring an action against the company on that acceptance, to frustrate all attempts made by the plaintiffs to defend that action; that he obtained judgment 8th April, 1870, for about £120, and issued execution; that he concocted a scheme with the defendant Keogh, one of the assisting directors, who was appointed special bailiff, and Capes another such director, bidding for him, to have all the property of the company purchased by a hasty secret sale at undervalue, 14th May, 1870, the debt to him being taken as part of the purchase money; that it was sold for about £130 to Capes, the property sold being worth over £2,000, and nothing being actually paid. It is further stated, and not contradicted, that in September, 1870, Wekey, Keogh and Capes were tried, convicted and sentenced to imprisonment at the Melbourne Criminal Sittings, for a fraudulent conspiracy to defraud the company. Notwithstanding this conviction, Wekey kept possession of the property purchased. He has succeeded, also, from the difficulties presented by the partnership deed, in thwarting all efforts to have new directors appointed, and has kept the common seal. There is some conflict of evidence as to whether at meetings of the company about January, 1871, it was resolved not to take any proceedings in equity to set aside Wekey's purchase.

A part of the company's property with which I have now to deal was 7a. 1r. 23p., part of a lease from the Crown, forfeited by its predecessor, for a new lease of which the company had applied at the time of the sale, and which was issued after 30th May, 1870. On the 20th June, 1870, Keogh, as bailiff, transferred all the property of the company, including this lease, to Wekey. On the 2nd August, 1871, Wekey, as in consideration of £530 paid, and a bill of costs due to his solicitor, assigned all the same property to Ireland; and on the 20th September, 1871, Wekey's title to the lease was recognised at the Titles Office, and on the same day Ireland obtained a certificate of title.

The plaintiffs' affidavits allege that Ireland gave no consideration for the transfer, but the lease was transferred to him as a trustee for the other defendants, and that he had notice of the fraudulent conspiracy, and of the circumstances under which the pretended sale took place. Ireland's answering affidavits, in which he is supported by Wekey, state him to be an absolute purchaser of the property, and to have got possession of it, and I deal with the case only upon the grounds of his being a purchaser with notice. He does not definitely state of what facts he had, and of what he had not, notice, but says, [*5] "save as hereinafter mentioned," he had no notice, "hereinafter mentioned" including speaking to Wekey about this conviction; and therefore, I suppose, knowing the offence laid to his charge. He says he had heard and relies upon the fact that the members of the company had resolved to take no proceedings in equity—that, I suppose, includes his knowing what was the pretence of their proceedings. A resolution of that kind could not amount to a renunciation of their rights or a determination to submit without resistance to a proceeding not then foreseen in the Land Titles Office, which would enable him to have these rights for ever. His history of his dealings with Wekey is, that they were not personally acquainted before May, 1871 ; that Wekey was then in undisturbed possession ; that he made advances to him, for the purpose of erecting machinery and working the mine, which were to be repaid by the first yield of gold, and in contemplation of the possibility of his acquiring an interest in the mine, contingent upon the title to the same being perfected ; that, on the 2nd August, Wekey informed him that the Mining Department was going to forfeit the lease for breach of conditions, and to be specially severe in regard to his conviction, and proposed, instead of partnership, that Ireland should release him from his liabilities, and purchase the property, in consideration of past advances, £505 10s., and this bill for £530 payable in a month. The past advances appear by other documents to be £155 10s. cash, and machinery valued at £350. An affidavit states

that Ireland purchased this machinery for £150, secured by bills, which he never paid ; and as to the £530 bill, Ireland and Wekey are agreed that it was not paid, but sued upon without result. There is thus considerable discrepancy between the alleged consideration for these dealings and the consideration recited in documents—always a matter of suspicion.

There is, I think, a question of fact to be tried in this suit, as to the extent of Ireland's knowledge of Wekey's dealings ; and, further, a question of law as to the meaning of "except in the case of fraud," in No. 301, Sec. 50 ; and, further, whether dealings completed with a person before he becomes a proprietor under the Act can be protected by the machinery of the Act as to his vendee, by making him a proprietor, and at the same instant a transferor. The immense power which that Act gives to a proprietor of completely barring clear equities presents, I think, a reason for Courts of Equity readily interfering by injunction.

Refuse the application to dissolve ; costs to be in cause.

The suit was ultimately dismissed for want of prosecution.

Solicitors :—Gresson—Morrison.

VICTORIA, 1887.—WEBB, J.] [13 V. L. R. 80.

COWELL v. STACEY.

"Transfer of Land Statute," Secs. 37 & 42—Transfer—Notice of outstanding equitable interest—Registration of transfer.

The "Transfer of Land Statute" was not intended to abolish the principle of notice. Notice of an equitable interest in another, given to a purchaser of land under the Act at any time before he has completed his title by getting his transfer registered, is sufficient to entitle the person in whom the equitable interest is, to prevent the issue of a clear certificate of title to such purchaser.

Action by purchaser against vendor for the specific performance of a contract for the sale of land.

On the 7th May, 1886, the plaintiff, Mary Rosina Cowell, wife of Edward Cowell, entered into a contract with the defendant, William Stacey, to purchase from him for £120, some forty-six acres of land under the "Transfer of Land Statute" in the neighborhood of Port Albert, of which Stacey held a lease from the Crown. She paid £41 11s. in cash and gave a promissory note at three months for the residue of the purchase money, £79 9s. Some little time after the contract was entered into, the plaintiff heard that the defendant John Cotter was about to purchase the land from the defendant Stacey, and, as she alleged, she wrote to him telling him not to do so. However, on 11th August, 1886, Stacey sold the same land to Cotter for £160, of which £60 was paid in cash, and the residue was to be paid in cash when Cotter obtained a certificate of title to the land; and on that day a transfer of the land by Stacey to Cotter was executed by Stacey, stating the consideration paid as £160. On the 12th August Stacey signed a transfer of the same land to the plaintiff, and about the same time gave the plaintiff possession of the land. On the 22nd September the defendant Cotter lodged a caveat in the Titles Office against any dealings with the land, and on the 30th September lodged his transfer for registration, and produced the lease to Stacey from the Crown. The plaintiff had, in the meantime, viz., on the 28th September, lodged a caveat in the office against any dealing with the land without notice to her. She then brought the present action against Stacey, Cotter and the Registrar of Titles, to restrain the registrar from issuing a certificate to Cotter, and for a declaration [*81] that she was entitled to the property, and that all the necessary instruments should be executed to transfer the land to her.

Stacey and the Registrar of Titles did not defend the action.

Evidence was given for the plaintiff that Cotter had, on two occasions before the sale to him, been warned not to buy the land from Stacey, as he had already sold

it to the plaintiff; and after the sale, viz., on the 11th August and 26th August, letters were written to him giving him notice of the sale to the plaintiff. Stacey, who was called as a witness for the plaintiff, admitted having signed both contracts of sale, but alleged that when he sold to Cotter he did not know what he was doing, inasmuch as he was drunk at the time. The defendant Cotter denied that Stacey was at the time drunk, and asserted that he was perfectly sober. He also denied having received any notice of the sale by Stacey to the plaintiff prior to his own purchase, and stated that he had only received one letter, that of the 11th August, and did not receive that till the 28th August.

Neighbour for the plaintiff:—The contract with Cotter was later in point of time than that with the plaintiff. No transfer of this land was registered under the "Transfer of Land Statute" (No. 301), and therefore by Sec. 42 no interest passed. It then becomes a simple question of priority of equities, and the maxim qui prior est tempore potior est jure applies. In this case the Court can grant specific performance of the contract with the plaintiff, because the defendant Cotter had notice of it when he entered into his contract, and the Court can also order Cotter to convey the property to the plaintiff: Dart on Vendors and Purchasers (5th Ed.), 996, citing Potter v. Sanders.[1] And even if Cotter had no notice, he took no estate or interest in the land, because his transfer was not registered.

Topp, for the defendant:—It is submitted that the evidence shows that Cotter had no notice of the contract entered into with the plaintiff. The only letter he got was received on the 28th [*82] August, although dated the 11th August. But even if he had notice, he is not to be affected by it, because when he inspected the registry he finds no caveat lodged by the plaintiff. The Titles Office takes the view that the Act regards the lodgement of the transfer for registration, and not the time of making the entry thereof: Sedgfield on Practice of Titles Office (note to Sec. 42). It is submitted that

[1] 6 Hare, 1.

notice at any time before the completion of the title by registration is not sufficient. The question is whether the Court will interfere to restrain the registration of a transfer when the contract has been entered into with a person who had no notice. Under Sec. 37, the first person to present a transfer for registration is to be registered, and by Sec. 42, if two present transfers at the same time, that of the person producing the duplicate grant or certificate of title is to be registered. Here the defendant Cotter presented his transfer for registration first; and, in addition, produced the Crown lease.

[Webb, J.—If there be a caveat, the Titles Office is not to register either of the transfers. According to your argument, the moment any person bought a piece of land under the "Transfer of Land Statute" he would be bound to go at once and lodge a caveat lest his vendor should sell to some one else afterwards.]

The policy of the Act is that every purchaser should lodge a caveat. Under the "Transfer of Land Statute" registration is equivalent to conveyance under the old law.

[Webb, J.—Yes; and notice at any time up to conveyance was sufficient under the old law. Why is it not sufficient now if given at any time before registration?]

If the plaintiff had lodged a caveat we should never have gone on with our contract. We have complied with the Act, and the plaintiff has not, and we should therefore be registered; or at all events, the Court should not interfere on behalf of the plaintiff, who has been guilty of such default.

Webb, J.—This is an action by Mrs. Mary Rosina Cowell against William Stacey, John Cotter, and the Registrar of Titles, to have it declared that the plaintiff is entitled to certain land, of which Stacey held a lease from the Crown, and to restrain the registrar from issuing a title thereto to Cotter. [*83] On the 7th May, 1886, the plaintiff entered into a contract in writing for the purchase from the defendant Stacey of the land in

question. A portion of the purchase money was paid in cash, and a promissory note at three months given for the residue, but by an agreement between the vendor and purchaser, the promissory note was lodged with a stakeholder, was to be paid to him when due, and the proceeds not handed over by him to the vendor until the plaintiff had obtained a registered title. After this the vendor entered into some arrangement—I can hardly say a contract—with the defendant Cotter, the only evidence of which is a transfer signed by the vendor and Cotter, which stated that the sum of £160 had been paid by Cotter to the vendor for the same piece of land, and transferred the same piece of land to Cotter. Cotter in his evidence says that all he ever paid was £60, but he adds that if he had procured the transfer to be registered, he would have paid the other £100. The vendor, by his appearance in the box, has satisfied me that he is correct when he says that he is addicted to drink. He says he was drunk when he signed this transfer to Cotter, and I am inclined to believe he was.

There is a conflict of evidence as to whether Cotter had notice of the sale by Stacey to the plaintiff. Two witnesses for the plaintiff relate conversations, in which Cotter was told of the sale to the plaintiff, and warned that if he purchased from Stacey, it would be in direct conflict with the sale already made to the plaintiff. Cotter meets this by a bare denial of either conversation having ever occurred. He does not admit a conversation having taken place but give a different version of it. Upon that conflict of evidence, I believe the witnesses for the plaintiff ; and I find that the defendant Cotter before any negotiation with the vendor Stacey had actual notice of the contract entered into by Stacey with the plaintiff. There is further a letter of the 11th August, in which distinct notice was given to the defendant Cotter. He himself says he received it on the 28th August. On the 22nd September Cotter lodged a caveat against any dealings with the land ; on the 28th September, the plaintiff also lodged a caveat, [*84] and on the 30th September, the defendant Cotter

lodged his transfer for registration, but the plaintiff's caveat blocking the way, it could not be registered. At that time he had, as I find upon the evidence, had notice, both before and after his contract, of the plaintiff's rights under her contract.

It is contended at the bar that whatever might have been the rule before the "Transfer of Land Statute," or is still the rule as to land not under that Act, as regards land under that Act a person with notice of an outstanding equity in somebody else may lodge a transfer to himself for registration, and that the Titles Office is bound to register it. The statute was never intended to abolish the entire principle of notice, and to provide that a man getting a transfer when he had notice of another's rights might have it registered and defeat those rights. The principle of notice still exists as it did before the Act. Notice of an equitable interest in another given to a purchaser before he had completed his title by procuring a conveyance was sufficient under the old law, and under the new law until a person has completed his title by getting his transfer registered he is just as amenable to notice. The policy of the Act is that when once registration is effected the holder of a certificate of title shall have a good title, whether he had notice or not of outstanding equitable interests; but the whole scheme providing for caveats is to prevent him from obtaining a clear certificate while any rights are outstanding in others. Till the transfer is actually registered a person having an equitable interest in the property can stop the issue of such a certificate.

In this case the plaintiff is entitled to the relief she seeks and a declaration that the plaintiff's contract and the transfer to her take priority over the contract and transfer to the defendant Cotter. The legal estate at present is in the vendor, as neither transfer has been registered, so that the second paragraph of the prayer asking that Cotter may transfer to the plaintiff is inapplicable. The third paragraph is for an order that the defendants Stacey and Cotter perform all acts

necessary to vest in the plaintiff the estate and interest of Stacey in the lease. I do not know that there is anything more to be done, but I will direct that all parties perform all acts necessary to enable the transfer [*85] to the plaintiff to be registered, and I order the defendant Cotter to pay the plaintiff her costs of this action.

Solicitor for the plaintiff :—Walduck.

Solicitors for the defendant Cotter:—Egglestone & Derham, for Bushe: Sale.

VICTORIA, 1869.—STAWELL, C.J.] [6 W. W. & a'B. (L.) 81.

IN THE MATTER OF THE "TRANSFER OF LAND STATUTE" AND IN THE MATTER OF THOMAS H. POWER.

A Judge in Chambers has no jurisdiction upon summons to make an order under the Act No. 301, Sec. 24, restraining the registrar from bringing land under the Act. To obtain such an order the caveator must either bring an action or file a bill.

Summons referred to the Court by Williams, J., by which an order was applied for, restraining the Registrar of Titles, under the "Transfer of Land Statute" (No. 301), from registering Power as the owner of land in Smith street, Collingwood.

Power bought the land in 1842, had conveyed part of it, but never executed a conveyance of the part which he now applied to have brought under the Act. A caveat was lodged against his application by Thomas Smith, who set up a claim to the land by adverse possession for more than fifteen years.

[*82] Webb for the caveator :—Under Sec. 24 of the "Transfer of Land Statute," the caveator is entitled to an order of a Judge restraining the registrar from bringing this land under the Act. Smith having been in possession for more than fifteen years, has now under the "Real Property Act," Sec. 43, a good legal title, and not merely a possessory right ; and by that section the right and title of Power is absolutely extinguished. Under the present law, as distinguished from the old

Statutes of Limitation, which only barred the remedy, adverse possession for more than fifteen years confers an absolute title—Doe d. Carter v. Barnard [1]—and one which a Court of Equity will force upon a purchaser: Scott v. Nixon.[2] Smith is therefore entitled to come in and oppose Power's application. It is true the certificate to Power, if issued, will be subject to claims by adverse possession; but if the certificate of title be once issued it will give him a title which he does not now possess, and deprive Smith of the title which he has now acquired. He could never sell the land, and the utmost he could do would be to prevent being ejected.

T. a'Beckett for Power:—An order obtained on summons from a Judge in Chambers is not the order contemplated by the Act. Secs. 23, 25, 26, and 117 recognize the distinction between proceedings before a Judge and proceedings in Chambers. Sec. 24 omits any provision as to a summons in Chambers, clearly shewing the intention to exclude that jurisdiction in a proceeding by a caveator against an applicant. The section is to be read as providing for a proceeding in a Court of competent jurisdiction to establish title, and notice of that proceeding to be given to the registrar; or an injunction or order obtained on that proceeding, not on summons. Otherwise an applicant would, by proceedings in Chambers, be permanently excluded from the benefit of the Act, without the possibility of an appeal, which he would have if it were by an injunction.

[*83] Webb in reply:—A claimant by adverse possession can take no active proceedings to establish his title. He is in possession, and therefore he cannot bring an action of ejectment; he has no equity against the applicant, and therefore he cannot file a bill in equity. He is thus helpless, and though he has a good statutory title—which before the grant of the certificate of title he can convey or otherwise deal with—yet, as soon as this title is issued, he can do nothing and is deprived

[1] 13 Q. B. 945.

[2] 3 D. & War. 388.

of his property. Sec. 24 is divisible into two parts, each intended to meet cases falling within it. Under the first, where a person can establish his title, he must do so either by suit for specific performance or by ejectment ; under the latter part, where a person is in such a position that he can take no steps to establish his title, he may obtain a Judge's order.

Stawell, C.J.—I am against the application on every point. But in this preliminary one, against the jurisdiction of the Judge, I entertain no doubt whatever, for I have had occasion to consider it more than once. I think the only way to read Sec. 24 is that the caveator must bring an action of ejectment, or file a bill in equity. I do not think that by "order of a Judge," the Legislature meant a Judge in Chambers ; for where they did mean that, they have said so plainly.

Summons dismissed.

[Note.—In re Power was practically overruled by Ex parte Gunn, 3 V. L. R. (2) 36, and Ex parte Gunn was followed in Ex parte Beissel, 5 V. L. R. (L.) 53. The case is here reprinted because frequently cited.—Ed.]

VICTORIA, 1878.] [4 V. L. R. L. 63.

WIGGINS (Appellant) v. HAMMILL (Respondent).

"Transfer of Land Statute" (No. 301), Sec. 153—Fraud—Erroneous description in application.

A misdescription in an application to bring land under the "Transfer of Land Statute," as that the land was unoccupied, will not, under Sec. 153, invalidate a certificate of title ; there must be fraud with guilty intention.

Semble, that such a matter could not be decided collaterally, and the certificate could not be treated as void, in a civil suit ; the person charged with such fraud should first be convicted by a jury, and then proceedings might be taken to cancel the certificate of title.

Appeal from the County Court, Melbourne, in an action of ejectment to recover possession of 20 acres of land at Ringwood. At the trial the plaintiff put in a certificate of title, issued to him under the "Transfer of Land Statute" (No. 301). On the 18th August, 1876,

the plaintiff applied to have the land brought under the statute. In the application, the land, and also contiguous land, was said to be unoccupied. The certificate of title was issued on the 10th May, 1877. The defendant gave evidence that he had been in possession of the land for more than fifteen years; that at the time of the plaintiff's application he was still in possession of a part of it; and that he occupied contiguous land. This, it was contended, was a fraud under Sec. 153 of the Act, and rendered the certificate void. The learned Judge agreed with this view, and gave a verdict for the defendant, against which the plaintiff appealed on the grounds, (1) That the plaintiff's certificate of title was, under Sec. 47 of the Act, unimpeachable and indefeasible, and that the Judge ought not to have declared the same void under Sec. 153; (2) That evidence of the plaintiff's application to bring the land under the Act, and of matters connected therewith, was wrongly admitted; (3) That there was no evidence that the plaintiff wilfully made any false statement in the application.

Cock for the appellant:—The defendant tried to prove adverse possession, but had to abandon that defence, and he relied on the false statement in the application, as invalidating the certificate of title, under Sec. 153. That section refers to false statements wilfully and fraudulently made, [*64] and the certificate ought not to be avoided and the plaintiff found guilty of a misdemeanor, as a collateral matter in a civil action. The plaintiff should be put upon his trial for the misdemeanor; and if he were found guilty, special proceedings would have to be instituted, under Sec. 132, to cancel the certificate of title. It was shown that the defendant was aware of the plaintiff's application to bring this land under the Act, but, as he had not received a notice, he did not lodge a caveat. The certificate of title cannot be impeached in this manner: Chisholm v. Capper,[1] Miller v. Moresey.[2]

[1] Vic. No. Cas. 60.

[2] 2 V. R. L. 193; 2 A. J. R. 115.

Quinlan for the respondent :—The Judge is not responsible for the statement of the grounds of appeal in the special case. If, on any view of the facts, the finding of the Judge can be supported, this Court will not interfere: Edelman v. Heyneman.[3] The defendant set up adverse possession for more than fifteen years (our statutory period), and the Judge has decided in his favour, on a conflict of evidence. The decision may also be supported, if there appear to have been fraud on the part of the plaintiff, other than that which would be a misdemeanor,—legal fraud, so to speak, as distinguished from criminal or moral fraud. The omission to state something which would have prevented the issue of the certificate of title is a legal fraud as much as that on which the decision in that case was based. [Stawell, C.J.—The only fraud relevant to this case, is a fraud under Sec. 153.] The Judge, as a jury, has found fraud ; how can this Court disturb that finding ? [Stawell, C.J.—Because there is no evidence of the fraud which alone, under Sec. 153, could invalidate the certificate.]

Stawell, C.J.—It is possible the decision might have been supported on the defence of adverse possession, without going into the only question on which the learned Judge has actually decided. [*65] One objection set out in the special case is, that the Judge ought not to have declared the certificate of title void ; he has signed the case so stated, and we are asked to ignore that objection. We cannot do so.

As to fraud under Sec. 153, though it is unnecessary now to decide the point, it would be only just that a person charged with such a fraud should be tried by a jury ; the language of the concluding part of the section apparently implies a conviction for a criminal offence. Such a charge ought not to be suddenly sprung upon a litigant in a civil suit. There seems to have been merely a mistake, and a pardonable one, in the application to bring the land under the Act. It is immaterial whether the defendant was misled by it ; nullus reus nisi mens sit rea.

[3] Argus, Nov. 26, 1859.

As it is said that there is a good defence of adverse possession, it would be better that the case should be reheard.

Appeal allowed; case to be reheard.

Attorney for the appellant:—W. S. Woolcott.
Attorney for the respondent:—Prendergast.

VICTORIA, 1870.] [1 V. R. (E.) 11.

ROBERTSON v. KEITH.

Real estate—Sheriff's sale—"Transfer of Land Statute"—Certificate of title—Adverse possession.

The defendant bought at a sheriff's sale the estate and interest of W., registered proprietor of land under the "Transfer of Land Statute." Part of this land had been previously sold by W. to the plaintiff, who was in possession, and before and at the sale gave the defendant express notice of his interest. The defendant became registered proprietor of the allotment under a transfer by the sheriff, and brought an action of ejectment against the plaintiff. On bill to restrain proceedings in ejectment, and to constitute the plaintiff registered proprietor of the land in his possession.

Held, that his interest was that of a tenant within the meaning of Sec. 49 of the statute, and decree made as prayed.

Observations made upon the terms "adverse possession" and "fraud" in that section.

In April, 1865, James Western bought from the Crown two allotments of land at Steiglitz, and in May, before the issue of the Crown grant, sold part of the allotment to the plaintiff, who paid his purchase money and went into possession, but obtained no transfer from Western. In November, 1868, the defendant obtained a judgment against Western, who, by the issue of the Crown grant, had then become the registered proprietor under the "Transfer of Land Statute" of the whole allotment, part of which had been sold to the plaintiff. The sheriff sold all Western's estate and interest to the defendant, and a transfer from the sheriff in the form prescribed by the "Transfer of Land Statute," schedule 15, was registered, constituting the defendant registered proprietor of the whole allotment. Before, and at the time of the sale, the plaintiff, who continued in possession, gave the de-

fendant express notice of his interest by protest and otherwise, but he did not lodge any caveat against a transfer to the defendant. The defendant brought an action of ejectment against the plaintiff, who consented to a verdict, on the terms that the defendant should not sign judgment or issue execution until a day named, and that the verdict should be without prejudice to the right of the defendant at law to proceed as plaintiff in equity. The plaintiff (defendant at law) now filed his bill against the plaintiff at law for a perpetual injunction against further proceedings in the ejectment, and to be constituted proprietor under the "Transfer of Land Statute" of the land bought by him from Western.

[*12] Mr. Lawes for the plaintiff:—The defendant having bought at a sheriff's sale, can take no greater interest than that of the execution debtor. The transfer under the statute is of the debtor's estate and interest, and Western had no interest as against the plaintiff in the land sold by him to the plaintiff. The notice given by the plaintiff and the formal protest against the sale of his land, made the defendant's purchase fraudulent as against the plaintiff, and qualified his right under the certificate of title, fraud being an express exception to the absolute title given by Sec. 49 of the statute. The plaintiff was also in adverse possession as against the defendant within the meaning of Sec. 49. The statute does not destroy equities: Maddison v. McCarthy,[1] Raleigh v. Glover.[2]

Mr. J. W. Stephen and Mr. a'Beckett for the defendant:—It is immaterial by what process the defendant became proprietor, whether by transfer from the sheriff or otherwise; being registered proprietor, the only material consideration is whether the defendant's interest can be brought within any of the specified exceptions to the absolute character of the registered title. Sec. 50 of the statute disposes of the exception of fraud by providing that express notice shall not constitute fraud, and there is nothing but notice in the present case which

[1] 2 W. W. & a'B. Eq. 151.
[2] 3 W. W. & a'B. Eq. 163.

can be urged as fraud by the defendant. There is no deception or inducement to the plaintiff to abstain from perfecting his title or any other misconduct which could be held as fraud under the section. The exception as to adverse possession is of rights subsisting under it, that is, of a title matured by adverse possession under the "Statute of Limitations." The section does not recognise adverse possession as a right in itself. The defendant has omitted to lodge a caveat to protect himself under the statute, and has allowed the plaintiff to acquire a statutory title which cannot be impeached.

Mr. Lawes in reply :—The plaintiff's possession at the time of the transfer to the defendant is undisputed; and if he had no rights under an adverse possession, he had rights as a tenant, and his tenancy is protected under Sec. 49. Under the terms of his tenancy he was entitled to hold the land in fee, and the defendant's certificate is subject to the plaintiff's interest. [*13]

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

The facts of this case are, that in 1865, after the passing of Act No. 140, a Mr. Western purchased land at a Crown land sale. Afterwards, before the issue of the Crown grant, he sold part of it to the plaintiff, Mr. Robertson, for a price (£33), half cash, half bill, by agreement in writing. The plaintiff continued on the land and built at a cost of £70. He afterwards paid the bill. He neglected to register his transfer with the registrar under Act No. 140, Sec. 99, before the Crown grant to Western issued. Western sold another part to Mr. McGonigal. The Act No. 301, "Transfer of Land Statute," was afterwards passed. The defendant, Mr. Keith, recovered a judgment against Western for £64 10s. 9d., issued execution, and on 6th February, 1869, the sheriff sold to Keith the right, title, and interest (if any) of Western in the land (except that sold to McGonigal), and in adjoining land, for the sum of £13. The plaintiff at the sale protested, and gave the most distinct notice to the defendant, the sheriff and persons present of his

title, but omitted to lodge a caveat against registration of transfer under Act No. 301, Sec. 116. The sheriff executed a transfer to the defendant, 19th March, 1869 (reciting that Western was registered as proprietor in fee simple), of the estate and interest of Western as registered proprietor; and on the same day the transfer was registered and certificate of title issued to the defendant, making him a proprietor under the Act.

The defendant relies upon the 47th, 49th, 50th, and 106th sections of the Act No. 301 as giving him title. For the plaintiff, it has been insisted, firstly, that the sale, because it was by a sheriff, did not defeat his equitable right. The 19 Vic. No. 19, Sec. 176, authorises the sale of "all interest to which the execution debtor is "entitled in lands and real estate which he might, accord-"ing to the laws of Victoria, have disposed of," by which the sheriff could convey the legal estate of the debtor, and the same protection against equitable claims, as the debtor's conveyance would give; that is, free from equitable claims of which the purchaser had no notice. The Act No. 301, Sec. 106, says that the transfer from the sheriff shall have the same effect as if made by the proprietor—that is, as if made by the proprietor under itself; an opposite intention is shown as to assignments to official assignees in insolvency—Sec. 107—who are to hold subject to equities, but enabled to sell discharged of equities. [*14]

This leads me to deal with the case as if Western had transferred to the defendant, having similar notice of the plaintiff's claim. The 47th section makes a certificate conclusive evidence of title. The 49th says, notwithstanding the existence of any estate which but for the Act might be held to have priority, the proprietor of land under the operation of the Act shall hold the same subject to incumbrances notified in the register book, but free from all other incumbrances (which by interpretation clause includes estates). But, as to this, there are several exceptions—first, in case of fraud. Now to interpret fraud, the 50th section says, "except in case of

fraud," and goes on to say that no person taking a transfer from a proprietor shall be affected by notice, actual or constructive, of any trust or unregistered interest, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud. This explanation shows that the advantage gained by the present defendant should not be regarded as fraud. I should instance, as to what might be deemed fraud under the Act, collusion between proprietor, vendor and vendee, to defeat an equitable interest, or means taken by the vendee to induce a person having equitable interests not to enforce his right or lodge a caveat. The defendant here is not charged with having done anything of this class to gain priority.

Passing now to other exceptional provisions, Sec. 49 says: "The land included in any certificate shall be "deemed to be subject, etc., to any rights subsisting "under any adverse possession of such land and to any "public rights of way, etc., acquired by enjoyment or "user, etc., and also when the possession is not adverse "to the interest of any tenant of the land, notwithstand-"ing the same respectively may not be specially notified "as incumbrances on such certificate or instrument." The first of these provisions was probably introduced in regard to the fifteen years "Statute of Limitations," but does not refer to it. The provision does not save all rights of persons in adverse possession, but saves rights under possession—that is, derived from possession. This is fortified by the clause including easements acquired by user. The second exceptional provision relates to the interest of any tenant of the land—that is, I think, all interests, not merely the tenant interests. The entire clause seems intended to provide for all cases of possession, distinguishing merely adverse possession and tenancy. As to tenants in the ordinary sense of the word, it is to be observed that the Act enables those having more than ten years, to bring their tenures under the Act, but nowhere, expressly at all events, requires tenants of any length of interest to register their interests as incumbrances. [*15] Returning to the clause, it might

be contended that the saving of adverse possession means saving rights under the "Statute of Limitations," and that the saving of tenants' interests has reference to tenants in ordinary parlance as to their tenant interest; and that Sec. 50 prevented possession operating as constructive notice; and at one time I was much inclined to that view, but I have doubtingly changed it. The words "adverse possession" have a clear legal meaning still operative as to the necessity of demand of possession before ejectment, when the possession is not adverse. The cases are collected in Roscoe on Evidence: N. P., 623. Formerly the "Statute of Limitations" did not operate until the occupier's possession was adverse: Nepeau v. Doe d. Knight,[3] Doe. v. Carter.[4] The law on that subject was altered, 3 and 4 Wm. IV. cap. XLVII., giving the same effect to possession without acknowledgment of title, as to adverse possession; but the Act did not change the legal meaning of the words "adverse possession." The plaintiff's possession here was not legally adverse when the transfer to the defendant was effected: Morley, etc., Ed. Watkins' Conveyancing 20 and last case. I do not rest my decision upon the ground of possession being constructive notice to the defendant, but that his possession not being adverse, the 49th section saved all his rights. One in possession as a tenant at will does not, I think, come under the protection of the provision for adverse possession, but would have among his other occupier's rights, a right to rely on possession under the "Statute of Limitations." As to this doctrine defeating the policy of the Act, I have to notice that it will in any construction be necessary for persons wanting secure titles under transfers to ascertain who are in possession, lest some may have adverse possession; if then they find persons in possession claiming as here, the matter may be brought to a crisis by the proprietor demanding possession, which, if refused, will make the tenancy adverse, and then the Act will be operative to give title, subject to the difficulties of occupants protected by the

[3] 2 M. & W. 894.

[4] 9 Q. B. 863.

"Statute of Limitations." Such demand of possession will give the occupier notice of the necessity of preserving his rights by prompt action.

I do not think that either Raleigh v. Glover[5] or Maddison v. McCarthy[6] bears on this case. In the first I decided that a person becoming a proprietor by money furnished by another was a trustee for him, and might be compelled to convey to him; it has nothing to do with such person's power to make title to a third, affected with notice. As to [*16] the second case, Maddison v. McCarthy, it was under the Act No. 140. A person became a registered proprietor subject to a liability to give a mortgage, the person entitled to which, apprehending that the proprietor was about selling, not only gave notice of his claim, but lodged a caveat against transfer, and filed his bill, the transfer not having been effected, and I established his right against both. There are other distinctions between that case and the present.

The plaintiff has not, either by the prayer of his bill or argument, sought to be relieved from the costs of the ejectment, and I rather think he should not, as he should have resorted to equity before expense was incurred at law.

"Order that the defendant be restrained by the per-
"petual injunction of this Court from proceeding to
"execution in the ejectment in bill mentioned, by
"habere facias possessionem as to the land in the se-
"cond paragraph of the bill described. Declare that
"the plaintiff is entitled to be registered as the proprie-
"tor of the same land, and order the defendant to sign
"a transfer thereof, and to do and concur in all neces-
"sary acts and things at the plaintiff's expense, for the
"purpose of obtaining the registration of the plaintiff as
"proprietor thereof under the 'Transfer of Land Sta-
"'tute,' to be settled by the Master in case the parties
"differ. Order the defendant to pay the plaintiff his
"costs of this suit. Refer to the Master to tax the same.
"Liberty to apply."

Solicitors:—Woolley and Harwood—Higgins.

[5] 2 W. W. & a'B. Eq.

[6] 3 Ib. 163.

SUPREME COURT, VICTORIA, 1887.] [13 V. L. R. 389.

IN RE "THE TRANSFER OF LAND STATUTE," IN RE WALL, EX PARTE PEARSON.

"Transfer of Land Statute," s. 117—Removal of caveat—Practice, by whom summons to be signed—Affidavit, when to be filed.

On an application to remove a caveat it is not necessary that the summons should be signed by the Judge in Chambers, it is sufficient if it be signed by his associate. It is not necessary that an affidavit in support of such summons should be filed upon the issue of the summons, it should be filed within a reasonable time before the return of the summons.

Summons referred to the Full Court by Holroyd, J. This was a summons under Sec. 117 of the "Transfer of Land Statute" (No. 301), calling upon Wall to show cause why a caveat lodged against certain land should not be removed. Holroyd, J., in referring the summons to the Full Court, suggested the following questions of practice :—(1) Is it necessary that the summons to show cause be signed by a Judge in Chambers ? (2) Would it not be sufficient for the Judge's associate to sign and issue the summons ? (3) Whether it is necessary that, upon the signing and issuing of the summons, an affidavit should be filed ? (4) Would it not be sufficient for the affidavit to be served and filed a reasonable time before the return of the summons ?

Hodges in support of the summons. [*485]

No appearance on behalf of the caveator.

Per Curiam. [Higinbotham, C.J., Williams and Holroyd, JJ.]:—We think the applicant is entitled to an order to remove the caveat. With reference to the questions asked as to the practice, we think it not necessary that the summons should be signed by a Judge in Chambers, and that it is sufficient if it be signed by his associate. An affidavit need not be filed upon the issue of the summons ; it is sufficient if it be filed within a reasonable time before the return of the summons.

Solicitors for the applicant :—Davies, Price & Wighton.

VICTORIA, 1870.] [1 V. R. (L.) 165.

COLONIAL BANK v. ROACH.

Tenant at will—Ejectment—"Transfer of Land Statute," s. 49.

When R. had entered into possession of land, under a contract made with a person, from whom those seeking to eject him themselves derived title, Held, that before they could maintain ejectment R. was entitled to a demand of possession.

A tenancy at will is "an interest" within Sec. 49 of the "Transfer of Land Statute."

Rule nisi to enter a verdict for defendant.

This was an action of ejectment. The facts were shortly as follows: In 1859 the defendant became tenant of one Hugh Glass of forty-six acres of land; and a few years afterwards Glass bought for the defendant an additional twenty-four acres, the defendant agreeing to pay him the purchase money by instalments, and Glass giving the defendant a lease of the land for four years, and agreeing that when the last instalment was paid defendant should have the fee. Glass afterwards, in June, 1869, gave the plaintiffs a mortgage on these twenty-four acres, as well as over other property; and at that time all the money had not been paid. For part of the land the plaintiffs held a certificate of title, and the mortgage to them was registered. At the time the mortgage was given the plaintiffs knew nothing of the lease. The jury returned a verdict for the plaintiffs, and defendant obtained a rule to enter a verdict for him on the ground that the plaintiffs had not demanded possession from defendant before action.

[*166] Casey and Holmes moved the rule absolute.

Ireland, Q.C., Fellows and Dr. Hearn shewed cause.

The arguments appear fully from the judgment of the Court.

The cases cited were Keech v. Hall,[1] Doe d. Martin v. Watts,[2] Rex v. Collett,[3] Right v. Beard.[4] Sec. 49 of the

[1] 1 S. L. C. 523.
[2] 2 Esp. 501.
[3] R. & R. 498.
[4] 13 East, 210.

"Transfer of Land Statute" was also cited on behalf of the plaintiffs.

Cur. adv. vult.

Stawell, C.J.—Action for ejectment. The defendant was in possession under a document which partook of the character both of a lease and a contract for sale. The verdict was for the plaintiffs, leave being reserved to move to enter a verdict for the defendant as no demand of possession was proved; and the plaintiffs contended that they were entitled to maintain the action without any such demand, although it was conceded that the defendant had entered under a contract made by a person from whom the plaintiffs themselves derived title. A portion of the land had been brought under the "Transfer of Land Statute," and a certificate of title was produced, and it was urged that as regards the portion comprised in this certificate the Legislature gave the holder an indefeasible right both at law and in equity; the certificate being conclusive evidence not merely of his title but also of his right to the possession.

As regards the premises not comprised in the certificate of title, there can be no doubt that the defendant was entitled to a demand of possession. With reference to the parcels comprised in the certificate of title, Sec. 49 of the Act contains a proviso "that the land included "in any certificate of title shall be deemed to be subject "to any rights subsisting under any adverse possession "of such land; and also where the possession is not ad-"verse to the interest of any tenant of the land, notwith-"standing, the same respectively may not be specially "notified as incumbrances on such certificate or instru-"ment." Now this as an interest in a tenancy at will may be very small, but still it is an interest, and the possession now is not adverse—the [*167] defendant does not dispute the title of the plaintiffs. He merely contends that he has been placed lawfully in possession by the person from whom the plaintiffs derive title, and that he is entitled as of right to a demand of possession before he can be treated as a trespasser. The plaintiffs almost concede this, but contend that Sec. 88 gave them

a power, as mortgagees, which the holder of a certificate of title did not possess. That section enables a mortgagee to enter into possession, or bring an action of ejectment; but the action of ejectment is to be brought in the same manner in which he might have brought such action if the mortgage money had been secured to him by an assurance of the legal estate in the land mortgaged or charged.

It may seem a somewhat large power to confer upon any person to enable him to bring ejectment when he has no title whatever, but we think, putting it at the very highest, it does not place the mortgagee in a better position than the owner; that he holds the certificate of title subject to Sec. 49; and that he cannot suddenly change a person rightfully admitted into possession under a contract, into a trespasser without having made a previous demand of possession. We think, therefore, that the plaintiffs failed, and that a nonsuit should be entered.

Attorneys for plaintiffs:—Vaughan, Moule & Seddon.

Attorneys for defendant:—Sterling & Murphy.

VICTORIA, 1871.] [2 V. R. (E.) 20.

BREW v. JONES.

"Transfer of Land Statute"—Sheriff's sale—Prior purchase—Unpaid vendor.

Purchase at a sheriff's sale of the interest of a registered proprietor, perfected by transfer, held void as against the plaintiff's interest as prior purchaser from the registered proprietor, but good as against the registered proprietor's right and interest in respect of unpaid purchase money.

Bill, charging fraud and collusion against a solicitor dismissed as against him but without costs.

Suit to have the registered proprietor of land under the "Transfer of Land Statute" declared a trustee for the plaintiffs, on the ground that the certificate of title had been obtained by fraud and in collusion with the plaintiffs' solicitor. The plaintiffs were George Brew and his wife, and the official assignee of Brew. The land, the subject of the suit, had been purchased from

defendant Kennedy by Mrs. Brew before her marriage, and before the issue of the Crown grant to the vendor. The defendant Jones subsequently bought, at a sheriff's sale, under an execution against the vendor. The defendant Norton, who had formerly acted as solicitor for the wife in the matter of her purchase, and for the husband in the matter of an advance by Jones on the security of the land, procured as for Jones the Crown grant to Kennedy which had been subsequently issued, and also a certificate of title to Jones, as entitled to the fee under the sheriff's sale. Jones' title under the certificate was impeached by this suit, as having been obtained in fraud of Mrs. Brew's rights. The facts are more fully stated in the judgment.

Mr. J. W. Stephen for the plaintiffs :—The absolute title under the "Transfer of Land Statute" is subject to exception under Sec. 49, in the case of fraud, and of actual occupation of the land by a tenant. The plaintiffs are entitled to the benefit of both exceptions : Robertson v. Keith.[1] Nothing passed by the sheriff's sale, except the vendor's right to the balance of purchase money due by Mrs. Brew. Kennedy, the vendor, is a necessary party in respect of this interest. Norton, who was cognisant of all the facts, and acted throughout as the solicitor of the Brews, was instrumental in obtaining an absolute title for Jones, to which he knew Jones was not entitled. He is, therefore, answerable to the plaintiffs for their costs of the suit : Marshall v. Sladden.[2]

[*21] Mr. Holroyd for the defendants :—The bill treats Jones as having no interest in the land, although he had a clear right as mortgagee which was known to all the plaintiffs. The only case made by the bill is one of fraud and collusion. The defendant rests on his rights as mortgagee. There is no offer to redeem or recognition of any interest which would admit of a decree for redemption ; and fraud not having been proved, the bill must be dismissed. Norton acted with the consent of

[1] 1 V. R. Eq. 11.
[2] 7 Hare 428, 440.

the husband, and as he is co-plaintiff with his wife, she cannot be heard to object in this suit to what was done with his consent.

Mr. J. W. Stephen in reply.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

The defendant, John Kennedy, prior to 1865, had procured a certificate from the Board of Land and Works, that he had a residence and cultivation license for 160 acres of land, and was entitled to the advantages thereof, under the Act No. 145, Sec. 33, "Land Act, 1862," and had paid on account of £80, the purchase money of half the said land, £60, and he agreed to sell his interest to the plaintiff, Mary Anne Brew, then Leacy, for £100, she paying the £20 due (to the Government), and she paid him £80, leaving £20 due out of the £100. This agreement was carried out by a memorandum in writing, executed 27th March, 1865, by which Kennedy agreed to convey his interest to Mrs. Brew, hand over his documents of title, and enable her to obtain the Crown grant, and to sign a conveyance ; and she took possession. Mr. Norton acted as solicitor for both parties in this negotiation, and received from Mrs. Leacy £20 to pay the purchase money due to the Crown ; this he denied in his answer, but admitted upon the taking of evidence. There is a conflict of evidence as to what he was instructed to do to complete her title. He did nothing ; and so left it exposed to be impugned by persons claiming under Kennedy. She married 18th July, 1865, the plaintiff, George Brew, who took possession and cultivated. Brew had dealings with the defendant, John Jones. On 27th May, 1867, he gave his acceptance for £300, payable a year after date ; also, a bill of sale over the freehold half of the said 160 acres, farming implements, horses, etc.; also, an agreement charging the land with the amount of the acceptance, and authorising Norton (who acted for both parties in this transaction also) to hold the deeds of the same freehold [*22] as security for the loan. The defendants have sought to show that Mrs. Brew sanctioned the charge upon the

property, but I think they have failed, and that she only knew of the loan as charged upon growing crops and chattels. Her husband could bind the land to the extent of his marital interest, but she, as a married woman, could not be bound, even by express agreement. On 9th October, 1867, Brew voluntarily sequestrated his estate, describing the 80 acres as his property, charged with £300 to Jones. The plaintiff, Mr. Shaw, was his official assignee ; he never attempted to take possession. Both Mrs. Brew and Jones allege that they have since been in exclusive possession ; in the taking of the accounts they will find it to their interest to change these allegations ; they seem really to have been scrambling for it. Mr. Robert Dunlop, a creditor of Kennedy, obtained a judgment against him, and issued execution, December, 1867, and there was a discussion between the Brews, Jones and Norton as to what should be done with it, whether to caution purchasers in regard to Mrs. Brew's interest, or to purchase in, and thus get a simple title from Kennedy and screen the property from Brew's other creditors, which seems to have been Norton's advice. There is some conflict of evidence as to the Brews' concurrence, and I think, on the whole, that Jones, without it, purchased Kennedy's interest from the sheriff for £46, and took a conveyance from him. The Crown grant of the 80 acres, dated 1865, was issued to Kennedy prior to December, 1868 ; Norton, acting for Jones, procured it from the Land Office, as on whose behalf does not appear, but I presume as for Jones, purchaser at the sheriff's sale ; and being armed with it and the evidence of the sheriff's sale 4th March, 1870, he procured a certificate of title from the Land Titles Office for Jones.

The bill was filed 9th July, 1870, by Mrs. Brew, her husband as her protector, and Shaw, who could claim only as assignee of Brew's marital interest. It omits all notice of the loan transaction between Brew and Jones ; it describes Jones as purchasing at the sale with full notice of Mrs. Brew's title ; it states that Norton procured the Crown grant as solicitor for Mrs. Brew, and, fraudulently colluding with Jones, handed it to him

and procured for him the certificate of title. The bill seeks to have the land conveyed to the plaintiffs according to their respective titles, they offering to pay the balance of £20, and it seeks to make Norton responsible for costs. Jones' answer sets up his claim for £300, as if it affected the entire freehold—not merely Brew's marital interest. [*23]

As to Norton being made a defendant, he was wrong in not securing the plaintiff, Mrs. Brew's, interest, apparently inadvertently regarding her as fully represented by her husband; and subsequently he was wrong, in being a party to Jones procuring a title which might be used prejudicially to her interests, without securing them. But the bill totally omits facts mitigating his apparent culpability, and makes a case, not of fraud in law, but in popular language. There is much reason to suppose that he acted with the approbation of George Brew, a co-plaintiff. There is no evidence that the defendant Jones is insolvent, so as to require the making Norton a defendant to secure costs.

As to all the defendants, the bill appears to have been sealed without preliminary demands, which would probably have resulted in settlement without litigation. I shall dismiss the bill as against Norton without costs.

"Declare that the purchase from the sheriff by the "defendant, John Jones, of the interest of John Ken-"nedy in the bill named was void as against the plaintiff "Mary Anne Brew's purchase from Kennedy in the bill "mentioned, save as to £20, the balance of the purchase "money left unpaid, and interest thereon at 8 per cent. "per annum, to which the said John Jones is entitled as "such purchaser. Declare that the said defendant, "John Jones, is entitled to a charge upon the interest "of the plaintiff, George Brew, as the husband of the "said Mary Anne Brew, in the said land for the money "advanced about the 27th March, 1867, in the answer "mentioned, secured by the documents therein men-"tioned. Refer it to the Master to take an account of "the actual advances made by the said defendant Jones "to the plaintiff George Brew, on account of the said

"securities, and of his receipts on account thereof from "the said George Brew, the chattels comprised in the said "securities and the said lands, taking the said accounts "with interest at the rate of 12 1-2 per cent. per annum, "applying the receipts to interest, and then to sink the "principal, making all just allowances, and striking a "balance to the date of his report. Declare that the "defendant Jones should have an option to take posses-"sion of the land, and be thenceforth accountable for "the rents, issues, and profits thereof as mortgagee in "possession, or renounce all present right to the posses-"sion thereof; and direct that a writ of habere, if neces-"sary, do issue to put the parties respectively into pos-"session according to such option. Dismiss the bill, "without costs, as to the defendant Norton. As between "the plaintiffs and the defendants Jones and Kennedy, "reserve further directions and costs. Liberty to apply."

Solicitors :—Hopkins for McDonald—Palmer & Hedderwick.

SUPREME COURT, VICTORIA, 1879.] [5 V. L. R. (L.) 5.

In re "THE TRANSFER OF LAND STATUTE," *Ex parte* ROBERT BROWN.

"Transfer of Land Statute" (No. 301), sec. 24—Caveat—Order to restrain registration—Adverse possession.

Where the title of a caveator is based upon adverse possession, the Court will not grant an order under Sec. 24 of the "Transfer of Land Statute" (No. 301), restraining the Registrar of Titles from bringing the land under the Act.

a'Beckett moved for an order under Sec. 24 of the "Transfer of Land Statute" (No. 301), upon the Registrar of Titles to show cause why he should not be restrained from bringing certain land under the "Transfer of Land Statute" upon the application of one A. E. Moore. The present applicant, Brown, lodged a caveat against Moore's application; but, being in possession under a good title, there are no proceedings which he can take, either at law or in equity, to follow up his

caveat. The matter falls within Ex parte Cunningham[1] and Ex parte Gunn.[2] The affidavit in support of this motion, shows that the caveator has a conveyance, executed in 1861, from one William Campbell, who had had possession from 1850 to that date, since which the caveator had been in possession. As Campbell was in possession when he conveyed, he must be taken to have been owner in fee. The caveator does not feel safe in relying upon his continuous adverse possession for the statutory period, though the certificate of title would, of course, [*6] be subject to it; for if the applicant, after obtaining registration, were in any way to get the caveator out of possession, it would be impossible for the latter to retain it. There is no privity of title between the caveator and the applicant Moore. [Stawell, C.J.—Why is this proceeding necessary? The caveator, according to his statement, has a good defence to an action of ejectment by the applicant. The Court, in Power's case,[3] declined to grant a restraining order under this section in a case where a person seeking it was in adverse possession.] We do not know what Moore's title may be. The caveator's conveyance in fee ought to be a bar to the registration of Moore as proprietor. There is no proceeding by which Brown's title can be forced upon the notice of the registrar, under his caveat; the caveat merely suspends registration for a month to allow of an action or suit being commenced (neither of which is open to us), or an order of this kind being obtained.

Per Curiam. The caveator may remain in possession, maintain it, and, if his statement be correct, successfully resist an action of ejectment. His documentary title, so far as the Court has been informed, commences with a conveyance from a person who was merely in possession of the land and had no other title than that arising from such possession. If the applicant could show a good documentary title independently of any adverse pos-

[1] 3 V. L. R., L. 199.
[2] 3 V. L. R., L. 36.
[3] 6 W. W. & a'B., L. 81.

session, he might be in a position to invoke this extraordinary remedy. On the materials now presented we cannot interfere.

Motion refused.

Attorneys for the caveator :—Macgregor, Ramsay & Brahe.

SUPREME COURT, VICTORIA, 1881.] [7 V. L. R. (L.) 314.

IN RE "THE TRANSFER OF LAND STATUTE" EX PARTE BOWMAN.

"Transfer of Land Statute" (No. 301), s. 135 — Summons to Registrar of Titles—Absence of probable ground for refusal to register land—Costs.

The Registrar of Titles is not justified in refusing to bring land under the Act, solely on the ground of an interpretation by the Commissioner of Titles of a devise in a will in opposition to a decision of the Supreme Court on the same devise; and that, although his interpretation is supported by a decision of the Supreme Court of a neighboring colony upon the same devise. His course, if an appeal depends, is to postpone the determination of the application until the question has been finally decided on appeal. But, as he is the guardian of the assurance fund, the Court would be slow to certify "that there was no probable ground for such refusal," so [*315] as to deprive him of his costs of a summons under sec. 135 of "The Transfer of Land Statute."

When, in the investigation of title, one objection appears which the commissioner considers fatal, yet all questions on the title hould be considered, the applicant ought not to be compelled to take out several summonses on one title.

Summons to the Registrar of Titles to substantiate and uphold the grounds of his refusal to bring certain land under the operation of the "Transfer of Land Statute." The registrar's statement concerning the title to the land was that William Hutchinson died on 20th July, 1846, having by his will dated 20th December, 1845, devised as follows :—

"I give and devise unto my trustees all the property at Melbourne (being the land in question), to hold to them, their executors, administrators and assigns, during the life of my daughter E. Bowman, upon trust, to receive the rents and profits and pay the same to her separate use without power of anticipation, and immediately after her decease to the use of all and every the children now born or hereafter to be born of the said E. Bowman by her present husband,

W. Bowman (except the eldest son, M. Bowman), equally to be divided between them as tenants in common in tail male with cross remainders between them in tail male."

Near the end of the will was a proviso in these terms :—

"Provided always that, if any person whom I have made tenant in tail male shall be born in my lifetime, then I revoke the devise so made to him, and in lieu thereof I give and devise the hereditaments comprised in such devise and appointment to the use of the same person respectively for the term of his or her natural life, and after his or her decease to the use of his or her first and every other son successively according to their respective seniorities in tail male."

The testator's daughter, E. Bowman, died about 29th August, 1849, leaving six children (besides M. Bowman) born of her by the said W. Bowman, all of whom were born in the testator's lifetime, and before the date of his will, one of whom died under age and without issue, on 25th March, 1866. Since the death of the testator, all of the six children above mentioned (except the one who died as above stated) assuming to be tenants in tail, have executed deeds purporting to be disentailing deeds. In 1874, they contracted to sell the land in question in fee simple, and the purchasers then applied to bring the land under the "Transfer of Land Statute." That application was rejected by the then Commissioner of Titles, Mr. Carter, Q.C., it being considered by him that all the grandchildren of the testator born in his lifetime (excepting M. Bowman) took life interests only. On [*316] 26th June, 1876, W. Bowman (one of such six children above mentioned) died intestate, and administration of his estate was granted to W. Lynch. In 1878, the judgment of the Supreme Court, upon a special case in the action of Lynch v. Johnson,[1] was taken upon the construction of the aforesaid portion of the will, when the Court held that W. Bowman was entitled in fee simple. But in a subsequent case in the Supreme Court of New South Wales, upon the same devise, that Court decided the other way, and an appeal to the Privy Council from

[1] 4 V. L. R. L. 263.

that decision is now pending. The applicants again applied to have the land brought under the Act, claiming to be owners in fee simple, and argued the judgment of this Court in Lynch v. Johnson[1] in support of their application.

The following were the grounds of refusal to bring the land under the operation of the statute :—

"That the question of ownership in fee simple of the land applied for, as required by Sec. 17 of the statute, is not at present settled by a decision binding upon all parties who may claim to be entitled under the said will; and that the risk of bringing the land under the Act, in favour of the applicants, in fee simple, is not such as, in my opinion, the assurance fund should be called upon to take. The property is valued by the applicants at £60,000. The title is otherwise long and complicated, but the aforesaid objection being considered vital, the other portions of the title have not been gone into."

The case first came before the Court in Trinity term last, when the Court directed the case to stand over until after the decision of the Privy Council upon the appeal from the Supreme Court of New South Wales. That appeal having now been determined in accordance with the previous decision of this Court the case was now again set down for argument.

Molesworth, for the Registrar of Titles :—As the question is now finally settled by the decision of the Privy Council in Gibbons v. Gibbons,[2] the registrar offers to proceed with the further consideration of the application.

Webb, Q.C., and a'Beckett in support of the summons :—The registrar bows to the decision of the Privy Council, but he would not yield to the decision of this Court in Lynch v. Johnson. In these circumstances, the applicant ought certainly not to have [*317] to pay the costs of the registrar. We ask the Court to certify,

[1] 4 V. L. R. (L.) 263.
[2] 6 Ap. Ca. 471.

under Sec. 135 of the "Transfer of Land Statute," that there was no ground for the refusal of the registrar to bring the land under the Act, so that each party may bear his own costs as in Re Patterson.[3] The commissioner had no right to set up his own opinion against the decision of this Court upon the very same devise in the same will. It is not to the purpose to allege, as is stated in his behalf, that the same question was before the Court of New South Wales, and that an appeal was pending in the Privy Council; no question as to this land could be raised in the Court in New South Wales; it is only an accident that the same will has been considered by the Courts in both colonies. The commissioner is bound by this Court. [Stawell, C.J.—In this case the assurance fund has to be protected, if possible.] The effect of a knowledge that the question would probably be referred to the Privy Council from the neighboring colony should have been at most a postponement, not a refusal, of registration. The registrar has put the applicant to unnecessary expense and trouble in refusing to proceed further with the investigation of the title; he has no right to force the applicant to take out a fresh summons for every individual objection, as the inquiry proceeds; he is not justified in assuming that the Court will agree with him in considering one objection fatal, especially in view of the previous decision. If he had proceeded with the inquiry into the whole title, it might have been completed by the time the decision of the Privy Council became known, and the applicant would have been spared a very vexatious delay. In strictness, an order ought now to be made that the land should be registered under the Act at once, as the Court decides that the only ground of refusal stated has not been substantiated. The assurance fund would have been sufficiently guarded if the registrar had simply determined to hold his hand, after the termination of his investigation of title, until he could ascertain the decision of the Privy Council. If the Court should allow the re-

[3] 8 V. R. (L.) 128, 3 A. J. R. 92.

gistrar his costs, the applicant is entitled to claim an order for the issue of a certificate of title.

[*318] Molesworth in reply :—The Court can hardly say that the registrar had no probable ground for refusing to register, when he was aware that the Supreme Court of New South Wales had taken a different view from this Court, on the same provision of this very will, and that the matter was under appeal to a Court whose decision might overrule that of this Court. He had also the opinion of the previous Commissioner of Titles, agreeing with his own and that of the other Court. He had to protect the assurance fund, especially in view of the great value of the property in question.

Stawell, C.J.—The registrar must proceed with the investigation of the title. He declined to proceed on the ground that one objection was conclusive against the title, that objection had already been overruled by a previous decision of this Court; but the devise in question affected also land in the adjoining colony of New South Wales, and in the Supreme Court of that colony a suit was pending involving the same question at the time the registrar was investigating this title. Under these circumstances, I think he would have had grounds for postponing the further investigation of the title until the question had been finally determined in that suit, either by appeal or by assent to the decision of the sister Court without appeal. He refused, however, to proceed further, as to bringing this land under the statute. Had the decision of the Court of New South Wales been in accordance with that of this Court, he might, in the absence of appeal from either decision, have well followed them, or if there was an appeal, awaited the decision of the appeal.

He reports that other points were involved, but that he did not go into them, because he considered this one fatal. In that view, I must be permitted to say, I cannot concur. It is his duty, as it seems to me, to investigate all questions arising upon the title submitted to him, and not subject the applicant to unnecessary expense or

delay by dealing with one point only at a time. Although entertaining this opinion, I concur in the observation that he has a duty to protect the assurance fund, and not to allow it to be subjected to risks which may be avoided. I do not feel justified, therefore, in certifying, in the concluding words of Sec. 135, [*319] "that there was no probable ground for such refusal." So as to deprive the registrar of his costs, the order of the Court will be that the registrar proceed with the investigation of any other objections there may be to the title.

Higinbotham, J., concurred.

Williams, J.—I have great doubts whether the facts disclosed do not afford reason for certifying that there was no probable ground for the refusal of the registrar, in the face of the decision of this Court; they show ground at most for his suspending proceedings for registration, not for refusal. But I should be reluctant to dissent from the decision of the other members of the Court, unless I felt perfectly sure that it was our duty to certify in the terms of Sec. 135.

Order accordingly.

Attorney for the Registrar of Titles:—Sutherland, Crown Solicitor.

Attorneys for the applicant:—Lynch & McDonald.

SUPREME COURT, VICTORIA, 1876.] [2 V. L. R. (L.) 31.

AUSTRALIAN DEPOSIT AND MORTGAGE BANK v. LORD.

"Transfer of Land Statute" (No. 301), secs. 90, 110—Purchaser of equity of redemption — Liability personally for mortgage debt.

The purchaser of an equity of redemption is not personally liable to the mortgagee, in the first instance, as upon a covenant to pay the mortgage debt.

Declaration in covenant upon a mortgage deed for payment of the mortgage debt. Plea, non est factum.

The facts were that one Wyllie had mortgaged certain land to the plaintiffs. Subsequently all Wyllie's interest was sold by the

sheriff, and the defendant became the purchaser. The land was registered under "Transfer of Land Statute." The plaintiffs sued the defendant, as transferee of the equity of redemption, upon the covenant to pay in the mortgage deed. A verdict was [*32] entered for the plaintiffs, leave being reserved to the defendant to move to set it aside and enter a verdict for him, or a nonsuit.

Lawes and Williams showed cause :—The question turns upon the "Transfer of Land Statute." Under Sec. 49 the proprietor holds subject to such incumbrances as may be notified on the folium of the register, and this is so notified on the folium of defendant's certificate. Sec. 90 (a) makes the transferee liable as if he had covenanted. Under Sec. 106, the purchaser at a sale under an execution becomes the proprietor. Sec. 110 (b) imposes upon him the same obligations and liabilities as if he had been the original proprietor. [Fellows, J.—That must be taken to relate to covenants which run with the land ; it does not say so far as the land is concerned : but there must be some limit ; it cannot extend to the original proprietor's tradesmen's bills.] Even if the words be too large, that is no reason for cutting them down from what they were intended to cover. The words "obligations and liabilities" are to be read as covenants running with the land, and the plaintiffs have a right to sue the transferee instead of selling under power of sale in the mortgage. [Fellows, J.—You are suing him for money lent to another man. In that view an heir would be liable for the debts of his ancestor, though the land descended were not worth the amount.] Then Sec. 90 would be open to the same objection. [Fellows, J.—That is harmless. It is that there shall be an implied covenant by the mortgagor that the transferee shall pay ; but such [*33] a covenant would be nugatory. The section operates to imply the covenant, but its value is another matter.] If Sec. 110 does not make the transferee liable, what is its effect ? [Fellows, J.—The Act is an Act to simplify transfers, not to create new liabilities.] It does a great many new things ; it takes away rights, etc. Sec. 90 makes a covenant binding on the transferee, and Sec. 110 carries that on and makes him liable on it ; he may sue and be sued ; that would be

inoperative if the section were limited. [Fellows, J.—Sec. 110 will carry on an old liability, but not create new ones; the transferee will be liable to indemnify the original mortgagor. [Stephen, J.—What is the limit you put on the liability?] It must be something charged upon the land. [Stephen, J.—Suppose half the mortgaged land to be transferred to one person, and half to another, is each liable for the whole debt, or how?] Each who becomes registered proprietor will be liable; people must take care of themselves. Though the effect seems absurd, the words are plain and must be given effect to, until altered by the Legislature. [Stephen, J.—There is a difference between holding land subject to debts and being liable to pay the debts.] If the Act does not alter the law as to former rights, it must be declaratory of it. But Secs. 51 and 59 do give new rights; Sec. 59 allows the transferee of the mortgage to sue upon the mortgage,—the converse of this case. [Stephen, J.—That rather prejudices your contention, for that section does the thing expressly which you say is to be implied here.]

(a) Sec. 90: "In every mortgage made under the provisions of this Act, there shall be implied covenants with the mortgagee and his transferees by the mortgagor, binding the latter and his heirs, executors, administrators, and transferees, that he or they will pay the principal money therein mentioned, on the day therein appointed, and will, so long as the principal money, or any part thereof, shall remain unpaid, pay interest thereon, or on so much thereof as shall for the time being remain unpaid, at the rate and on the days and in the manner therein specified," etc.

(b) Sec. 110: "Without lessening or prejudicing any of the other rights, powers, and remedies hereby given and conferred, every proprietor and every transferee, when registered, of any land, lease, mortgage, or charge, shall, whilst continuing so registered, have the same estates, rights, powers, and remedies, and be subject to the same engagements, obligations, and liabilities, and may sue and be sued in his own name at law and in

equity, in respect thereof or thereupon, in like manner as if he had been the original proprietor of the land by or with whom the engagement, obligation, or liability sued upon was entered into or incurred, or the original lessee, mortgagee or annuitant."

Dr. Mackay, a'Beckett and McDougall were not called upon to support the rule.

Fellows, J.—I do not think that the Act effects the alteration in the law for which the plaintiffs contend. It is the duty of the Court to give the Legislature credit for not desiring to do an injustice. Of course, where the language of an Act is clear, the Courts are bound to carry it out ; but where the language is not clear, it is not the duty of the Court to suppose that the Legislature meant to do an injustice, and to make one man pay another man's debt would be unjust.

[*34] The plaintiffs in this case contend that, under Sec. 110, the transferee of a mortgage is liable for the mortgage debt, in the same way as the original proprietor was. If the transferee is to have all the obligations of the original mortgagor, there is no qualification of that liability in the section. There is nothing to exclude his personal debts to the man who claims for work and labour done on the land, or even to the butcher or baker.

The object of the Act is to simplify the transfer of land, not to create new liabilities; it is to make the transferee liable to covenants running with the land. There is no doubt that Sec. 90 uses the word "binding," and on that the whole question turns. But "binding" must be read as "naming." The section provides that there shall be an implied covenant binding the mortgagor, his heirs, executors, administrators and transferees.

Well, supposing the covenant were inserted, what would be the effect of it ? The effect would be very little, so far as the transferee is concerned. It is something like the case in Dwarris on Statutes, quoting from 3 Reports : "By the Statute de Donis, it was enacted that a fine levied on entailed lands was null and void,

yet the construction put by the Court upon this was that it was not null, but was only a discontinuance, the reason being that at common law such a fine had only the effect of a discontinuance, giving the fines under that Act the same operation as others."

On the same principle, this covenant, if it were in the mortgage, would not run with the land ; for it is absurd to say that because a man purchases an equity of redemption at a sheriff's sale he is compelled to pay all the debts of the mortgagor. That is such a manifest injustice that, till the Legislature so enacts in so many words, we can not give it credit for attempting to do it. The mortgagee has still his remedy, as he had before, against the land.

Stephen, J.—The question as to the effect of an implied covenant does not really arise in this case, as there is an express covenant. But Sec. 90, in its language, does give a clue to what was intended. The argument of the plaintiffs is that the purchaser of an equity of redemption becomes personally liable to [*35] pay the debt of the mortgagor. Under the previous law, he certainly did not come under any such obligation. The obligation of the purchaser of the equity of redemption was to indemnify the vendor : and if the vendor was called upon to pay the mortgage debt or interest, then the purchaser of the equity was bound to indemnify him against it ; but the purchaser of the equity of redemption was not directly liable to the mortgagee. It was not the intention of this enactment to improve the position of the mortgagee in that respect.

The real meaning of Sec. 90 is plain, as it includes executors and administrators ; it means to bind the estate of the borrower in the hands of the heirs, executors, administrators, and transferees, and does not make them personally responsible. Sec. 110 means simply that the land is to have attached to it various rights and liabilities. To put an opposite construction on the Act would manifestly be to cause an injustice.

Rule absolute to enter a nonsuit.

Attorneys for the plaintiffs :—Davies & Campbell.
Attorney for the defendant :—Cuddy.

VICTORIA, 1891.—A'BECKETT, J.] [17 V. L. R. 17.

IN THE MATTER OF "TRANSFER OF LAND ACT, 1890."

IN RE ARMITAGE, EX PARTE ANDREWS.

"Transfer of Land Act, 1890" (No. 1149), secs. 85, 86, 134—Production of certificate of Title—Custody of certificate of title by mortgagee—Mortgagor, default of.

A. mortgaged land to B., and by a covenant in the mortgage it was provided that B. should have the custody of the certificate of title. A. transferred the land to C., who applied to B. to produce the certificate of title for the purpose of having his transfer registered thereon. B. refused to produce the document on the ground that A., the mortgagor, was in default, and that it was provided by the mortgage that the mortgagee should have custody of the certificate of title. C. took out a summons under Sec. 86 of the "Transfer of Land Statute, 1890," calling upon B. to produce the certificate of title.

Held, that the provisions of Sec. 134 of the "Transfer of Land Statute, 1890," overrode the covenant in the mortgage. and that, in the absence of special circumstances, the mortgagee must produce the certificate of title.

When there has been default by the mortgagor, and in consequence of that default an immediate sale is contemplated, and for the purpose of such sale the control of the certificate by the mortgagee is necessary, the Judge will recognize the right of such mortgagee, and will refuse to make an order compelling him to produce the certificate of title on an application under Sec. 86.

Summons by one Andrews, transferee of certain lands, calling on mortgagees of same to show cause why the Crown grants and certificate of title to such land, in possession of mortgagees, should not be produced for endorsement thereon of transfer from mortgagor to transferee.

The mortgage deed, dated 10th October, 1890, contained the following covenant: "And it is hereby further agreed and declared that the Crown grants, etc., for the time being of the land hereinafter described shall at all times during the continuance of this mortgage remain in the custody of the mortgagees."

The transfer by the mortgagor to the applicant, the transferee, was dated 29th January, 1891.

The transferee subsequently gave notice to the mortgagees under Sec. 134 of the "Transfer of Land Statute,

1890," to produce the certificate of title and Crown grants so that his instrument of transfer might be registered. Sec. 134 is as follows: "When any instrument subsequent to a first mortgage is made by the proprietor of any land, and such proprietor or the person entitled to [*78] the benefit of such subsequent instrument desires the registration of such subsequent instrument, the first mortgagee, should he hold the duplicate grant or certificate of title which comprises the land in such subsequent instrument, shall upon being requested so to do by the proprietor of the land or the person entitled to the benefit of such subsequent instrument, but at the cost of the person making such request, produce such duplicate grant or certificate of title to the registrar, so that such subsequent instrument may be registered." The mortgagees refused to produce the grants or certificates, and this summons was taken out under Sec. 86 of the "Transfer of Land Act, 1890." The mortgagor, it was admitted, was in default.

The attorney for the transferee in support:—The question is whether Sec. 134 applies to a case where the mortgagor is in default. The transferee does not seek for possession of the grants or certificates at all. Sec. 134 was part of an amending Act, and was inserted to meet the case of a covenant such as the present in a deed.

Weigall to oppose:—This clause was inserted in the deed for the protection of the mortgagee, and is not overridden by the Act. There has been default by the mortgagor.

Cur. adv. vult.

a'Beckett, J.—This is an application under the "Transfer of Land Act" for the production of Crown grants and certificates of title. The application is made by one Andrews, who is the transferee of the land from the mortgagor, and who desires to have the documents produced for the purpose of having his transfer registered. The mortgagees contend that such an order cannot be properly made against them, and they rely upon two

grounds. They say first that the mortgagor is in default, and secondly that there is a covenant in the mortgage, providing that they shall have the custody of the certificate of title, which they are now asked to part with for a specific purpose. There are three sections of the "Transfer of Land Act" which bear distinctly upon the subject. Sec. 134 provides. [His Honor read the section].

[*79] The terms of that section amount to a positive enactment, and I think this enactment overrides the covenant in this case, which provides that the mortgagees are to retain the custody of the documents. This section contemplates the mortgagee holding the certificate of title, and whether he holds under an agreement that he should hold or whether he holds it without, that positive enactment amendment applies and overrides the covenant. Coming under the rights given by Sec. 134, application was made for the production of the certificate of title and grants for the purpose of registering a transfer. Three guineas were tendered for the costs of doing so, but this was refused ; the mortgagees stood upon their rights and refused. That led to proceedings under Secs. 85 and 86, which enable the registrar to call upon persons in the position of these mortgagees who refuse to give up the certificate of title to appear. These sections give very large discretionary powers to the Judges before whom mortgagees are brought to see what shall be done under such circumstances. Now, excepting the objection raised on the covenant, the only other ground of objection urged was that the mortgagor was in default, and that therefore this order should not be made. I fail to see sufficient grounds in that default for refusing to give effect to the rights which the transferee has acquired from the mortgagor. The Act did not intend that the mortgagor having given a first mortgage should be deprived of the power of alienation. That alienation can only be effectually made by registration of the transfer. In this case it is said that the transfer is for the benefit of creditors. I do not think that affects the present case. This is a transfer to a person to whom

the mortgagor had a right to transfer, and that person wishes to have his title completed. As to the default, if such default had arisen, and in consequence of that default any immediate sale was in contemplation at the time which would require the control of the documents by the mortgagees, and it would be for their convenience to have such control, I might, under special circumstances, recognize the mortgagees' rights, and would see that those rights were not hampered by the mortgagor. Under special circumstances on the eve of a sale by the mortgagee, where it might be necessary that he should have control of the certificate of title, and the want of such control would interfere with his rights, I might refuse to make [*80] the order sought in this case. There are no such circumstances in the present case.

I will make the order directing the production of the documents for the purpose mentioned in the summons. The mortgagees have put the parties to some expense in the matter, and I therefore make the order that they should produce the documents at their own cost. I allow three guineas costs for this summons.

Solicitors for applicant :—Braham & Pirant.

Solicitors for mortgagees :—T. M. Smith, Emmerton & Johnson.

SUPREME COURT, VICTORIA, 1890.] [12 A. L. T. 108.

AUSTRAL OTIS COMPANY (LTD.) v. ANDREW KERR & COMPANY.

"Transfer of Land Statute" (No. 301), sec. 50—Mortgage—Fixtures —Notice—Fraud.

A mortgage of Land under the "Transfer of Land Statute" would cover machinery erected upon the land if either the machinery became part of the land, or if the owner of the machinery is estopped from denying that such machinery became part of the land.

Action by the Austral Otis Elevator and Engineering Company (Ltd.) against Andrew Kerr and Company (Ltd.), claiming, (1) return of certain property or its value, £617; (2) a declaration, if necessary, that the said pro-

perty is not subject to a certain mortgage, and that the plaintiff has a right to enter upon certain land, and remove the said property. The facts are as follows:—By an agreement dated 21st September, 1888, the plaintiff let to Messrs. Bennett Bros. at a quarterly rental certain chattels in the nature of machinery. It was provided by the agreement that if Bennett Bros. should make default in payment of their quarterly rents, or should assign their estate for the benefit of their creditors, the plaintiff should be entitled to enter upon the premises where the machinery was placed and remove it. It was also provided that the property should not vest in Bennett Bros. until the plaintiff had received the sum of £617 and interest thereon, from the date of delivery until Dec. 31st, 1888, and then payable at the said rate half yearly until the said property should be wholly paid for. In pursuance of the agreement Bennett Bros. took the machinery and placed it upon their premises at Newport, of which premises they were the registered proprietors, under the "Transfer of Land Statute." In August, 1889, Bennett Bros. mortgaged under the statute the said land and property to the defendants, who took the said mortgage with full knowledge and notice of the plaintiff's right; it was declared in the mortgage that the sum of £719 0s. 7d. should be applied by Bennett Bros. to the payment among other things of the balance unpaid to the plaintiff under the agreement of Sept. 21st, 1888. The said sum was never so applied. Bennett Bros. made default in payment of the quarterly rents, and in March, 1890, assigned their estate for the benefit of their creditors. The defendants took possession of the land, machinery, etc., and refused to permit the plaintiff to remove the machinery.

Mr. Fink (with him Mr. Isaacs) opened the case for the plaintiff.

Mr. Higgins (with him Mr. Topp) for the defendants. The articles claimed became fixtures; that being so, the defendants are entitled to retain them under the mortgage as the mortgage covers fixtures: Walmsley v. Milne, 7 C. B. N. S. 115; Climie v. Wood, L. R. 3 Ex. 257;

affirmed L. R. 4 Ex. 328. It is alleged that the defendants had notice of the plaintiff's claim. Even if that were so, it does not affect the position taken up by the defendants: "Transfer of Land Statute," Secs. 47, 50; Cullen v. Thompson, 5 V. L. R. (E.) 147. The defendants, however, had no notice of the plaintiff's claim. As to what are fixtures: Boyd v. Shorrock, L. R. 5 Eq. 72; Holland v. Hodgson, L. R. 7 C. P. 328.

[*109] Mr. Fink in reply:—The agreement between plaintiff and Bennett Bros. necessarily prevents the articles claimed from acquiring the character of fixtures till paid for. Moreover, in any event Sec. 50 of the "Transfer of Land Statute" would not apply, inasmuch as the plaintiff had nothing which could be registered; it is clear the defendants had notice from the terms of the mortgage itself of the plaintiff's claim, and fraud has been proved. He cited Woodfall, 14th Ed. pp. 643, 645; Wood v. Hewitt, 8 Q. B. 913; Navulshaw v. Browning, 21 L. J. N. S. Ch. 901, 911.

Cur. adv. vult.

His Honor:—It was much discussed before me whether the machinery, the subject of the action, or any part of it was a fixture. The machinery was all connected and used together. The brick bed of the engine and the containing wall of the boiler were firmly embedded in the ground. But there would have been no difficulty in disconnecting either the boiler or the engine from the brickwork to which it was fastened without injuring the brickwork in any way. It was only necessary to unscrew the nuts, withdraw the collars or keys, and then remove the bolts. The machinery was protected by a shed, erected only for that purpose, a flimsy structure, as one of the defendants' witnesses described it, and having a roof of wood and iron. The roof of the shed was put on by Bennett Bros. themselves, and not until after the machinery had been placed in position. In the course of the work some bricks were built over the front of the boiler, and a wall plate to support the roof was rested upon them. The effect was that the boiler could not be removed without taking off the roof

and displacing some of the bricks, or taking out one end of the containing wall of the boiler, and one end of the shed. If Bennett Bros. had been the owners of the machinery, and had mortgaged the land merely, the machinery was so annexed to the soil that it would have been included in the mortgage without being named. But here the difficulty begins. It was expressly agreed in writing between the plaintiff and Bennett Bros. that the machinery should not become the property of Bennett Bros., that is, it should remain the property of the plaintiff until fully paid for, and that in certain events, which have happened, the plaintiff should have power to enter upon any land where the same might be and seize, take, and carry away the same. The roof was put on in the manner I have described with the plaintiff's consent, but not with the intention of altering in any way the rights of the parties. Bennett Bros. and the plaintiff might have agreed, if they had been so minded, that Bennett Bros. should buy the machinery absolutely, and affix it to the freehold as part of their property, but that, if they made default in payment, the plaintiff should be at liberty to enter on the land, separate the machinery, and when separated resume possession of it as chattels. But, in my opinion, that was not what was meant. Obviously such an interpretation of the agreement into which they actually entered would annihilate the stipulation that the machinery should remain the plaintiff's property till paid for : Lancaster v. Eve, S. C. B. N. S., 717. Under an agreement by which A.'s chattel is affixed to B.'s soil, the intention of the parties must be considered in determining whether the chattel when affixed has, between them, become a part of B.'s freehold : Eve v. Lancaster, ubi sup.; Wood v. Hewitt, 8 Q. B. 913 ; Waterfall v. Penistone, 6 El. & Bl. 876. If the parties did not so intend, and the chattel is severable, I do not think that because B., for his own convenience, has subsequently protected the chattel by a shed, so erected that it might be damaged if the chattel were removed, the chattel would lose its character as such and become a part of B.'s freehold, in spite

of the agreement. As regards third parties, who dealt with B. without notice of the agreement, A. might be stopped from denying that the chattel was the fixture it appeared to be. Is the plaintiff estopped in the present case from relying on his agreement with Bennett Bros., or is he deprived of the benefit of it, as the defendants' counsel contended, by virtue of the 50th section of the "Transfer of Land Statute?" In August, 1889, the land and machinery were mortgaged by Bennett Bros. to the defendants. Before the mortgage was executed, the conveyancing clerk of the defendants' solicitors, by whom the instrument was prepared, and also the defendants' manager, must, in my opinion, have been aware of the agreement between the plaintiff and Bennett Bros. and of the nature of it, although they may neither of them have seen the document itself. The evidence of Thomas Bennett is strongly confirmed by certain clauses in the mortgage. These provided that a sum of £719 0s. 7d. should be applied in the first place to the payment of the balance which might be due from the mortgagors to any person or persons to whom any sums of money were then owing in respect of any plant, machinery, or other things of the like nature then upon the land thereby mortgaged and purchased by the mortgagors on credit or time payment, and until full payment remaining the property of the persons supplying the same upon agreements for letting and hiring, and that all plant and machinery sunk into or erected on the ground, or in anywise affixed to any fabric or upon the land thereby mortgaged, should, for the purpose of that security, be deemed to belong to and form part of the property thereby mortgaged as part of the freehold. The manager was furnished by Thomas Bennett with a list of the persons to whom Bennett Bros. were so indebted, including the plaintiff. Most of those persons were afterwards paid, but the plaintiff was not. Thomas Bennett testified that he consulted the defendants' manager, and was directed by him to leave the plaintiff unpaid, the money being insufficient to pay all the creditors. The manager denied this,

but at any rate he allowed Thomas Bennett to have control of the £719, and took no care to ascertain that the plaintiff was paid. Under these circumstances the defendants can no more dispute the plaintiff's claim than Bennett Bros. could have done if the machinery had remained in their possession unmortgaged, unless the plaintiff's claim is barred by the 50th section of [*110] the "Transfer of Land Statute." The defendants' counsel argued that by virtue of that section the defendants having taken a statutory mortgage of the land to which the machinery was annexed from Bennett Bros., who were the registered proprietors of the land, were protected against all persons claiming any interest in the land except in the case of fraud, and that knowledge of any trust or unregistered instrument affecting the land was not of itself to be imputed as fraud. The answer to this argument is, and in my opinion it is a conclusive one, that unless the machinery which Bennett Bros. contracted to purchase from the plaintiff became a part of the land of which they were registered as proprietors, or unless the plaintiff is estopped from denying that such machinery became part of that land, the 50th section cannot apply to the case. I have decided both these questions in the negative. The machinery remained a chattel, and is the plaintiff's chattel still. Minutes—Declare that the machinery mentioned in the statement of claim is not subject to the mortgage therein mentioned, but is the property of the plaintiff. Direct judgment be entered for the plaintiff for recovery of the said machinery, and order that the defendants permit the plaintiff's manager, or such other officer as the plaintiff may appoint for the purpose with such workmen and other assistants as may be necessary, to enter in the day time upon the premises of Bennett Bros., in the pleadings mentioned, and therefrom to separate and remove the said machinery, and to do all things necessary for that purpose, and take the said machinery away. I assess the value of the said machinery at £617. Direct judgment to be entered for the

plaintiff for £21 10s. damages, and costs of the action to be taxed.

Solicitors for plaintiff :—Fink, Best and P. D. Phillips.
Solicitors for defendants :—Lynch, McDonald, Stillman and Keep.

VICTORIA, 1889.] [15 V. L. R. 638.

ATTORNEY-GENERAL v. GOLDSBOROUGH AND OTHERS.

The Crown is bound by the provisions of the "Transfer of Land Statute."

Per Higinbotham, C.J., at page 654.

The second objection is founded upon the "Transfer of Land Statute." I concur in the view put forward by the defendant that the Crown is bound by this Act, although it is not expressly declared to be bound. The objects of this Act as stated in the preamble are: "To give certainty to the title in estates in land and to facilitate the proof thereof, and also to render the dealings with land more simple and less expensive." All these are objects of public and general as well as high utility, and the Crown is ordinarily bound by Acts passed for the public good though it is not named: Plowd, 136-7; Magdalen College Case (11 Co. Rep. 70b-73a). Moreover, the Crown shares with the subject the benefits and the aid of this Act; and it is reasonable that the Crown should also be bound by its conditions. All lands granted by the Crown since the commencement of the "Transfer of Land Statute" have been brought by the terms (of) the Act under its operation, and the Crown is enabled by means of a caveat to protect its interests in cases in which it would have a right by scire facias to repeal its grant. Such right of repeal, I think, would be an equitable "encumbrance" which, in order to bind land as against the proprietor, would have to be notified in the folium of the register book, or named as a condition in the Crown grant itself, except in case of fraud or of some other of the exceptions mentioned in Sec. 49. The same right of repeal would seem to be also an "interest" within Sec. 50, actual or [*655] constructive notice of which, if unregistered,

would not bind the proposed transferee, except in the case of fraud. A good deal of the argument turned upon the construction of Sec. 129 (iii.) in connection with the alleged invalidity of the caveat lodged by this registrar on behalf of Her Majesty upon the direction of the commissioner. The duty of the registrar when directed to lodge a caveat on behalf of the Crown, as presented in the first and second lines of this subsection, appears to me not to be limited by any of the subsequent words, or to the cases mentioned in the subsequent parts of that subsection. I think that the caveat which was lodged was valid, and if valid it would have continuing operation, and would not lapse until proceedings should be taken under Sec. 117, or otherwise, to have it removed. But the caveat, though valid, cannot be sustained in my opinion either as against the title of the Crown grantee and proprietor under the Act or against the transferee, as no fraud that would entitle the Crown to have the Crown grant set aside has been proved against either of those parties.

[This judgment was appealed to the Full Court which dismissed the appeal on other grounds.—Ed.]

SUPREME COURT, VICTORIA, 1878.] [4 V. L. R. (L.) 116.

IN RE THE "TRANSFER OF LAND STATUTE" AND THE CAVEAT OF HANNAH SUMMERS, EX PARTE AYLWIN.

"Transfer of Land Statute" (No. 301), secs. 23, 24—Lapse of caveat—Subsequent order to restrain registrar.

After the lapse of a caveat, forbidding the bringing of land under the "Transfer of Land Statute," the Court or a Judge has no power to make an order under Sec. 24, restraining the registrar from bringing the land under the Act.

Rule nisi to set aside an order of Barry, J.

The present applicant, Joseph Aylwin, had applied on February 14th, 1878, to the Registrar of Titles to bring certain land under the "Transfer of Land Statute." On February 20th, a caveat was lodged by the respondent, Mrs. Summers, against such application,

but she did not, within a month of the date, take any proceeding in a Court of competent jurisdiction to establish her title ; nor did she obtain any injunction or order to restrain the registrar. On March 25th, Mrs. Summers obtained from Barry, J., an order upon the Registrar of Titles to suspend all proceedings upon the said application until a certain action of ejectment brought by Aylwin against Mrs. Summers should be determined. In last term, Aylwin obtained the present rule to set aside this order, on the ground that the caveat of the [*117] respondent had lapsed before the date of the order, and that, after the lapse of a caveat, a Judge had no power to make an order in the matter of such caveat.

The respondent had herself, in January, 1877, applied to bring this land under the statute, and the present applicant had lodged a caveat against this application, following it up, within a month, by issuing a writ of ejectment against the respondent as the only proceeding open to him, though he claimed to be himself in possession. The affidavits did not show who was in fact in possession. That action was not proceeded with as being ineffectual; the defendant had, however, given the plaintiff notice to proceed to trial.

Topp showed cause :—The caveat of the respondent, Mrs. Summers, did not lapse ; it was kept alive by the action of ejectment brought by the applicant against her, in respect of this same land and in support of his caveat. Proceedings in a Court of competent jurisdiction—within the meaning of the "Transfer of Land Statute" (No. 301), Sec. 24—have been taken in respect of this same dispute as to bringing the land under the Act, and were certainly commenced before the lapse of a month from the filing of the respondent's caveat. It is not necessary that the caveator should be the actor in such proceedings ; it is sufficient if proceedings in respect of the same matter have been commenced to try the right. Nor is it easy to see what other course the respondent could have taken than to await the result of the action of ejectment, as Aylwin, by his action, admitted that she was in possession. If this order be set

aside, the applicant will be able at once to obtain registration, and the respondent will be deprived of the land, of which the applicant admits, by his action of ejectment, that she is in possession. Sec. 23 gives an alternative ; the registrar, on receipt of a caveat, is to suspend proceeding in the matter until such caveat . . . shall have lapsed . . . or until an order in the matter shall have been obtained from the Supreme Court or a Judge ;" no limitation of time is mentioned in this latter clause, and the present order is in pursuance of that power. In Sec. 24, the caveat does not necessarily lapse at the end of a month.

[*118] a'Beckett in support of the rule :—It is denied that the respondent is in possession. The action of ejectment was commenced as the only proceeding open to the applicant to keep his caveat alive and try the right. Re Power [1] has never been overruled on the point that a Judge in Chambers has no jurisdiction to make such an order as this. Ex. p. Gunn [2] and Ex. p. Cunningham [3] only decide that the Court may exercise this power. Sec. 23 refers to an order which will allow the registrar to proceed at once with the application ; he is not to proceed until either the caveat has lapsed, or an order allowing him to proceed, notwithstanding the caveat, is made. Both Sec. 23 and Sec. 24 refer to an order made during the operation of the caveat, and Sec. 24 requires proceedings which are to prevent the lapse of the caveat to be taken within the month by the caveator.

Stawell, C.J.—The Court had no power to revive the respondent's caveat. It is unnecessary to decide as to the effect of the institution of the action of ejectment in keeping alive the caveat which had then been filed. The Act, in relation to such cases, may be difficult of interpretation. It might have been necessary that a second action should be brought by the respondent. But the Court is now without jurisdiction in respect of this caveat, and the order of the learned Judge must be set aside.

[1] 6 W. W. & a'B. L. 81. [2] 3 V. L. R. L. 36. [3] 3 V. L. R. L. 199

Barry, J.—The cases cited were not brought under my notice. Had my attention been called to them, the order would not have been made. Rule absolute.

Attorneys for the applicant :—Crisp, Lewis & Hedderwick.

Attorneys for the respondent :—W. Field Barrett, for H. S. Barrett, Dunolly.

SUPREME COURT, VICTORIA, 1882.] [8 V. L. R. (L.) 11.

THE BANK OF VICTORIA v. McMICHAEL.

"Transfer of Land Statute" (No. 301), sec. 115—Attesting witness—Justice of the peace also manager for the mortgagee.

The manager of a bank, a justice of the peace is not incapacitated from acting as attesting witness to the execution of a mortgage, under the "Transfer of Land Statute" to his bank.

Dwyer moved for a rule nisi for a new trial or for a nonsuit. The action was ejectment by mortgagee against mortgagor, under a mortgage under the "Transfer of Land Statute" (No. 301). The verdict was for the plaintiffs. The mortgage was invalid, because it was unattested ; it purported to be attested by a justice of the peace, but as he was the local manager of the plaintiffs' bank, and advanced the mortgage loan, and so must be considered as virtually a party in the transaction, he was not competent to act as the attesting witness required by Sec. 115. The intention of that section is evidently that the attesting witness should be an indifferent person quite unconnected with the transaction. That was the only evidence (besides that of the document) in support of the plaintiffs' case. The mortgage showed that it was executed before the issue of the defendant's lease under "The Land Act, 1869," (No. 360), though not before the defendant was entitled to the lease. The number of the allotment was left in blank at the time of the execution of the mortgage, and was afterwards filled in by the plaintiffs' manager; that was a material alteration which vitiated the instrument. [Holroyd, J.—The evidence of the manager was, that it was agreed between him and the defendant that he should fill it in when it should be ascertained. The lease was sufficiently identified without the number of the allotment.] The lease was never executed by the lessee,

the defendant, and so cannot be taken to have been accepted by him.

Per Curiam. (Stawell, C.J., Higinbotham and Holroyd, JJ.) Even if the action had been between two strangers, the defendant's objection to the blank in the mortgage [*21] deed, having been filled up after execution, could not be sustained ; but here the defendant is estopped from saying that he had not the title which he purported to give. There is no proviso in Sec. 115 restraining an interested party from attesting an instrument ; and in this instance the manager was not the mortgagee. Rule refused.

SUPREME COURT, VICTORIA, 1889.] [15 V. L. R. 572.

THE COMMERCIAL BANK v. BREEN.

"Transfer of Land Statute" (No. 301), secs. 84, 91, 93—Ejectment by mortgagee—Demand of possession—Tenancy of mortgagor.

Sec. 93 of the Act No. 301 confers on a first mortgagee under the statute, in addition to the rights and powers given to him by the previous Secs. 84 to 91, the same rights and remedies to which he would have been entitled as owner of the legal estate under the old law, coupled only with a right in the mortgagors of quiet enjoyment until default. Unless this right amounts to a redemise to the mortgagor (which, at least where no time is fixed by the mortgage for payment of the money thereby secured, it does not do), the mortgagor is only a tenant at sufferance, and may be ejected by the mortgagee without any demand having been made for payment.

If no time is fixed for payment, the mortgagor has only a right of action for breach of his right to quiet enjoyment.

Semble, per Holroyd, J., the Court doubting. If a time is fixed by the mortgage for payment of the money secured, the right of quiet enjoyment given by Sec. 93 amounts to a redemise.

Appeal from judgment of Higinbotham, C.J. The action was one of ejectment, and was tried at Ballarat, when judgment was given for the plaintiff, and from this the defendant appealed. The material facts (which were admitted) are as follows : On the 30th March, 1887, a transfer of certain land at Bungaree was made by Bridget Breen to J. Bourke. On the 7th July, 1887, Bourke, who was not then registered transferee, mortgaged the land to the plaintiffs, the Commercial Bank. On the 16th July, 1887, Bourke was registered as

proprietor under the "Transfer of Land Statute," and at the same moment the mortgage was also registered. By the mortgage no term for payment of the moneys secured thereby was fixed. On the 8th October, 1887, Bourke died. Mrs. Breen had remained in possession of the land from the time of the transfer, which she alleged to have been forged, but which the Chief Justice found to have been genuine. On the 31st July, 1888, the plaintiffs made a demand in writing by a registered letter addressed to Bourke, at the address appearing in the register book, claiming payment of all the principal moneys, with interest, secured by the mortgage, but not stating any precise amount. On the 6th March, 1889, the writ for the recovery of possession of the land on this demand was issued by the plaintiffs against Mrs. Breen, the transferor in 1887.

Higgins and Shiels for defendant appellant: On these facts, and on such a demand, it is incompetent for the plaintiffs to re-enter. [*573] The mortgagee cannot exercise the powers imposed on him by the statute by sending a demand for payment to a dead man; if he wants to take advantage of the provisions of the Act the mortgagee must see that his letter is sent to a person for whom it is at least possible to receive it. Next, the demand was insufficient, because the mortgage being not for a fixed sum, but for an account current, some specified sum of money should have been claimed. Secs. 83, 88 of the "Transfer of Land Statute" regulate the position of the parties to a mortgage. The question here is, who is the proprietor when Bourke is dead? In Sec. 84 the notice to pay the money is to be directed to the "then proprietor" of the land. By Sec. 44 of Act No. 872, it is provided that one document constitutes a sufficent demand.

[a'Beckett, J.—Sec. 93 confers certain rights and remedies on the mortgagee, but does it do so as between the mortgagee and a stranger?

[Holroyd, J.—Secs. 84 to 92 are to supply omissions from the instrument of mortgage, to indicate the powers and duties attaching to the position of mortgagee; then

Sec. 93 confers on the mortgagee the legal and equitable rights which accrue to a mortgagee who has the legal estate under the old law as apart from the rights previously given to him by the statute].

Next, a notice to quit should have geen given to the defendant: Col. Bank v. Rabbage[1]; Col. Bank. v. Roache.[2] The defendant is a tenant at will.

[a'Beckett, J.—Is she not merely a tenant by sufferance ?]

No; Doe d. Hull v. Wood.[3]

[Holroyd, J.—In the case of Tew v. Jones,[4] Rolfe, B., says, at p. 14: "If a vendor remains in possession by agreement, the terms of that agreement will speak for themselves; if not he is a wrongdoer, and may be turned out by ejectment, and is liable to trespass for mesne profits. The supposed analogy of the case of mortgagor and mortgagee does not exist; the mortgagor is the tenant by sufferance of the mortgagee, in consequence of the peculiar relation existing between them; and which does not exist between a vendor and a vendee."]

[*574] It has not been proved that defendant was wrongfully in possession.

[a'Beckett, J.—Your whole argument depends on there being a tenancy at will, and you have not shown how the defendant is to obtain that].

That would have been easily proved at the trial if it had been thought the point would be taken. As to the demand being insufficient—Massey v. Sladen[5]—Cleasby, B., at p. 19, says: "The defendants are seeking to enfore the strict construction of a very stringent clause, by which the sum due is to be paid instantly on demand, without any delay, and on default the goods are to be seized. But if you are to enforce such a right you must make a demand which is specific, you must let the debtor know what is the sum you insist on the

[1] 5 V. L. R. (L.) 462.
[2] 1 V. L. R. (L.) 165.
[3] 14 M. & W. 682.
[4] 13 M. & W. 12.
[5] L. R. 4 Ex. 13.

payment of." McDonald v. Rowe[6] is of use as to the amount of the demand not being stated. There can be no default till demand, and the plaintiffs have not proved a proper demand in this case. They cited Moore v. Shelley.[7]

Madden (Purves, Q.C., and Hood with him) for plaintiff respondent. The argument for the appellants implies that the defendant is in the same position as the mortgagor, and that she is in possession as tenant at will.

[Holroyd, J.—We are agreed that she is not a tenant at will.]

Sec. 93 amounts to a covenant and not to a demise. The statute enacts that the mortgagor, and he only, has the right to quiet enjoyment as against the mortgagee. There has been a default. The plaintiffs did sufficient in sending to the mortgagor's address in the register book. The demand was also sufficiently precise, because all that was due was claimed, and it has been always laid down that the mortgagor is bound to know the state of his account and of his debt. There is nothing to show that the present defendant, who was on the land, may not have received the letter. In Massey v. Sladen the defendant could not tell the amount of his debt, but here he could, he could have had his bank book made up at any time. In McDonald v. Rowe the mortgagee had the option of asking for both principal and interest, or for interest only. [*575] He cited Vail v. Blair[8]; Coote on Mortgages (4th Ed.), 684; Preston's Sheppard's Touchstone (2nd Ed.), Vol. II., 272: Doe d. Paisley v. Day.[9] Cur. adv. vult.

The judgment of the Court [Holroyd, Kerferd, and a'Beckett, JJ.] was delivered by Holroyd, J.—This is an action to recover possession of certain lands described as allotments 2, 3 and 7, sec. 12, Parish of Bungaree, County of Grant. The case was tried before His Honor the learned Chief Justice, who gave judgment for the

[6] 3 A. J. R. 90.
[7] 8 Ap. Ca. 285.
[8] 13 V. L. R. 502.
[9] 2 Q. B. 147.

plaintiffs, with costs, and from that judgment the defendant now appeals. The facts, so far as they are material, are shortly these: On the 30th March, 1887, the land was transferred by Bridget Bourke (now Bridget Breen, the defendant), the registered proprietor, to John Bourke. On the 7th July, 1887, John Bourke mortgaged the land to the plaintiffs, the Commercial Bank. Both transfer and mortgage were registered on the 16th July, 1887. On the 8th October, 1887, John Bourke died. On the 31st July, 1888, the bank sent a demand in writing for the principal and interest due on the mortgage in a registered letter to John Bourke at his registered address. John Bourke being dead the demand never reached him, and no other person was registered as proprietor in his place. The mortgage is in the statutory form, or nearly so, and contains a covenant "to pay to the said bank or its transferees on demand in writing under the seal of the said bank, or signed in the name of or on behalf of the said bank by the general manager or inspector of branches for the time being of the said bank at Melbourne, or by the transferees of the said bank, and given to me, my heirs, executors, administrators or transferees personally, or left on the said land, or sent through the post office by a registered letter, directed to me or to the then proprietor of the said land at my or his address appearing on the register book, the balance which shall for the time being be owing by me, my executors or administrators, to the said bank on my account current with the said bank, and all and every other the sum and sums of money (if any) which the said bank or its transferees may (but without any obligation on it or them to do so) [*576] advance or pay or become liable to pay to or on account of me, my executors or administrators, or which now is or may become owing from or payable by me or them to the said bank or its transferees, for or in respect of any bills or notes which may be discounted or paid, or may for the time being be held by the said bank, or for or in respect of any loans, advances or credits which may be made or given to or for the accommodation or at the request of

me, my executors or administrators." It was contended that the demand for payment was invalid—first, inasmuch as it ought to have specified the exact amount claimed instead of making as it did a general demand for "all the principal moneys and interest secured by the mortgage;" and secondly, inasmuch as it was sent to a man who was dead. We were referred to various sections of the "Transfer of Land Statute," and more especially to Sec. 84, containing certain statutory powers and rights bestowed on mortgagees under the Act ; and it was contended for the defendant that as these sections gave no additional authority by which a mortgagee could sell otherwise than as prescribed, or eject, and as the demand was bad, the mortgagee in this case had no power to eject or sell. It is difficult to determine the extent of the mortgagee's power in regard to the various sections to which we have been referred, or to say whether the demand was good or not, but all that we need say is that this case is not governed by Secs. 84 to 91 of the Act, but by Sec. 93, which reads thus : "In addition to and concurrently with the rights and powers conferred on a first mortgagee and on a transferee of a first mortgage by this Act, every present and future first mortgagee for the time being of land under this Act, and every transferee of a first mortgage for the time being upon any such land, shall until a discharge from the whole of the money secured, or until a transfer upon a sale or an order for foreclosure (as the case may be) shall have been registered, have the same rights and remedies at law and in equity (including proceedings before justices of the peace) as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him, with a right in the mortgagor of quiet enjoyment of the mortgaged land until default in payment of the principal and interest money secured or some part thereof respectively, or until a breach in the performance or observance of some covenant expressed in the [*577] mortgage or to be implied therein by the provisions of this Act." The previous sections, commencing from Sec. 84, confer certain powers

and rights on a mortgagee who holds a mortgage in statutory form of land registered under the Act, as if the rights and powers were inserted in the instrument itself in the first instance. Then the 93rd section comes in as a drag net securing to the mortgagee, in addition to his rights and powers under the instrument, all the rights and remedies he would have had as owner of the legal estate under the old law, concurrently with a right in the mortgagor to enjoy the mortgaged land quietly until default. We are of opinion that in this case the mortgagee would have been able to eject the mortgagor, and most certainly can eject the present defendant, who holds and held adversely to him, and who says that the transfer to him was forged, which the learned Chief Justice found was not the fact. In ordinary mortgages under the old law, the mortgagor is only tenant at sufferance to the mortgagee, and may be ejected without demand, and a stranger is in no better position than the mortgagor. If, however, the mortgage contains anything amounting to a redemise the case is different, and during the time of the demise the mortgagor is entitled to the enjoyment of the land, and the mortgagee cannot bring an ejectment. If the mortgage contains a covenant to permit the mortgagor to have quiet possession till default and a term is fixed for payment, that covenant amounts to a redemise to the mortgagor ; it is different when no term for payment is fixed—in that case the covenant does not operate as a redemise. In one case the contrary was held : Doe d. Lyster v. Goldwin ;[10] but this decision was disapproved in Doe d. Paisley v. Day, reported at p. 147 in the same volume. The law on the subject is well summed up in Coote on Mortgages (4th Ed.), p. 684 : "If in the mortgage deed there is the usual proviso for the enjoyment of the land by the mortgagor until default in payment by a certain day, then, although the land is in the hand of a tenant, the proviso will operate as a redemise for the period in question. But where the proviso is merely that the mortgagee may enter and take possession on

[10] 2 Q. B. 143.

default in payment on the given day, or that the mortgagee shall not take the profits until default in payment, or, as it seems, that the mortgagor shall take [*578] the profits until default in payment (no definite time being in such last mentioned case fixed for payment of the mortgage money), in either of these cases the proviso only amounts to a covenant, and the mortgagee may bring an action for the land at any time without notice, although by the proviso he be required to give notice before entry, although there be a covenant for further assurances by the mortgagor in case of default in payment. The action can be brought although a bill of exchange has been given for the debt. In the earlier case of Doe v. Goldwin, where one of the trusts of a deed to secure an annuity was to permit the mortgagor to receive the rents until default in payment of the annuity, the Court of Queen's Bench held, upon the authority of Wilkinson v. Hall, that the trusts amounted to a redemise, and that notice to quit, given by the mortgagor to a tenant of the premises, was valid against a notice by the mortgagee to pay rent. But in his judgment in Doe v. Day, Lord Denman said: "It may be questioned whether sufficient attention was paid in that case to the point as to the certainty of time. The case therefore can hardly be considered as an authority." When we look at the reason it cannot be considered an authority. In Sheppard's Touchstone, p. 272, the author says: "If A. do but grant and covenant with B. that B. shall enjoy such a piece of land for twenty years, this is a good lease for twenty years. So if A. promise to B. to suffer him to enjoy such a piece of land for twenty years, this is a good lease for twenty years. So if A. license B. to enjoy such a piece of land for twenty years, this is a good lease for twenty years. And therefore it is the common course, if a man make a feoffment in fee or other estate upon condition that if such a thing be or be not done at such a time, the feoffor, etc., shall reenter, to the end that in this case the feoffor, etc., may have the land and continue in possession until that time, to make a covenant that he shall hold and take the pro-

fits of the land until that time; and this covenant in this case will make a good lease for that time if the uncertainty of the time (whereunto care must be had) do not make it void." [Mr. Preston adds: "The limitation of a certain term with a collateral determination on the event would meet the difficulties of the case."] "And therefore if A. bargain and sell his land to B. on condition to re-enter if he pay him £100, and B. doth [*579] covenant with A. that he will not take the profits until default of payment, or that A. shall take the profits until default of payment; in this case, howbeit, this may be a good covenant, yet it is no good lease" ["for want," says Mr. Preston, "of a more formal covenant, and also for want of certainty of time."] "And if the mortgagee covenant with the mortgagor that he will not take the profits of the land until the day of payment of the money, in this case, albeit the time be certain, yet this is no good lease, but a covenant only" ["since," says Mr. Preston, "the words are negative only and not affirmative."]

Then we have to look at the language of the 93rd section, which secures to the mortgagor the right to enjoy the land until default in payment of the principal and interest money or some part thereof. It is doubtful whether, if a time for payment were fixed, the words would amount to a redemise to the mortgagor, or do more than confer upon the mortgagee the right to bring an action for breach of his right to quiet enjoyment. I am inclined to say, yes, they would amount to a redemise; but this point need not be now decided. If, as in this case, no certain time is fixed for payment, it is not a redemise, and the defendant has no ground of defence by reason of the demand alleged in the statement of claim being insufficient, as the plaintiff can succeed without it. The statement of claim alleged a demand of the principal and interest, default, and the defendant's taking wrongful possession. These allegations were immaterial; the defendant was a mere stranger. It is contended on her behalf that as she remained in possession she acquired the character of a

tenant at will. But a vendor who remains in possession after a conveyance is not a tenant at all but a wrongdoer: Tew v. Jones.[11] That contention therefore fails. In all the points contended for by the defendant we think she has failed. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for plaintiffs:—Davies & Campbell.

Solicitors for defendant:—Gaunson & Wallace.

VICTORIA, 1867.—MOLESWORTH, J.]

[4 W. W. & a'B. (L. E. & M.) 20.

IN THE REAL ESTATE OF MARGARET HOOD, DECEASED.

An executor is not, by virtue of his obligation to pay the debts of the deceased, "a person interested" in the real estate of his testator within the meaning of Sec. 67 of the "Transfer of Land Statute," and is not entitled to a rule to administer under that Act.

Margaret Hood, by will dated before the Act No. 230, bequeathed all her "money and other effects" to her nephew and two nieces. The nephew obtained probate as executor, according to the tenor.

Mr. a'Beckett moved, on behalf of the executor, for a rule to administer the freehold lands of the deceased, upon the ordinary affidavits stating that the applicant was executor. The will does not pass real estate. The executor, as such, is entitled to a rule to administer the lands which are to be applied in payment of debts, and to be dealt with "as if held for a term of years," in other words, as if part of the personal estate. The executor, by virtue of his obligation to pay debts, is entitled to the order as a necessary step to getting in what is, in effect, an outstanding portion of the personalty. The beneficiaries under the will, who take by the testator's direction, are entitled to have this property (as to which no directions have been given) applied in exoneration of the personal estate. A "term of years" is as

[11] 13 M. & W 12

much subject to debts as other property ; and the rule is applied for, for the purpose of exonerating specifically bequeathed property, by property undisposed of. Unless the executor is for this purpose to be treated as a person "interested in the estate," [*21] within the meaning of the Act, a double administration will be necessary. The Act contains no provisions to meet such a case or to determine how or in what proportions the debts are to be borne by the real and personal estate, and the greatest confusion will be caused unless the executor, who has to pay, is entitled to the lands available for payment

Cur. adv. vult.

Mr. Justice Molesworth :—In this case the executor has, by applying for a rule to administer realty as an intestacy, admitted against his interest as legatee that the will did not pass real estate. The application is made by him as executor, and not as next of kin, and is supported on the ground that the executor is entitled to the real estate undisposed of to convert into a fund for the payment of debts. I have, therefore, to consider whether an executor, as such, is a "person interested in the estate," within the meaning of Sec. 67 of the Act. The first observation which arises on the application is, that there is no affidavit of any debts existing, but if there were debts I do not consider that the executor's obligation to pay them is such an "interest" in the real estate as is contemplated by the statute. At all events, the Court has a discretion. I should be disinclined to commit the administration to a person having only an indirect interest of this nature, and not a direct beneficial interest in the property to be administered. Had the application been by a legatee deposing to the existence of debts exceeding the value of the land, and seeking a rule for the purpose of applying it in payment in exoneration of the personal estate, very nice questions of marshalling might have to be considered, with which I am not at present called upon to deal. The motion is made on behalf of the executor, claiming the real estate

solely virtute officii, whithout stating any special circumstances, and I must refuse it.

SUPREME COURT, VICTORIA, 1879.] [5 V. L. R. (L.) 462.

THE COLONIAL BANK OF AUSTRALASIA v. RABBAGE.

"Transfer of Land Statute" (No. 301), sec. 49—Adverse possession—Tenancy previous to mortgage—Ejectment by mortgagee—Demand of possession.

The possession of a tenant of a mortgagor, under a tenancy created prior to the mortgage, is not adverse to the title of the mortgagee. The tenant is not obliged voluntarily to attorn to the mortgagee, and cannot be ejected by the latter, without a previous demand of possession.

Ejectment by mortgagee against tenant of mortgagor. The registered proprietor of the land in question, one Butler, on April 24th, 1877, gave to the plaintiffs a statutory mortgage, under the "Transfer of Land Statute." The defendant claimed to be entitled to a part of the land, under a lease for five years from Butler, dated April 14th, 1877. Default having been made in payment of principal and interest, notice to pay was given to the [*463] mortgagor on December 5th, 1878, the writ issued September 16th, 1879. The alleged lease was not registered, and the plaintiffs were not aware of it at the time of the mortgage ; and it was alleged that the mortgagor was in possession at the time of the mortgage. In January, 1879, the plaintiffs' manager at Castlemaine asked the defendant to give him a letter acknowledging that he was in possession for the plaintiffs, but the defendant refused.

The verdict was directed for the plaintiffs for all the land, except that under the defendant's lease, and for the defendant as to the latter portion. The present rule nisi was obtained to enter a verdict for the plaintiffs, as to the latter piece of land, on the ground that, on the facts proved at the trial, the certificate of title to the said piece of land is conclusive evidence of the plaintiffs' title to the said piece of land.

McFarland showed cause:—The plaintiffs were aware, at the time of taking the mortgage, that the defendant was in possession as tenant. The interest of the defendant is saved by the last part of the proviso of Sec. 49 of the "Transfer of Land Statute" (No. 301), as the interest of a tenant of the land where the possession is not adverse; so the plaintiffs as mortgagors, took subject to the defendant's tenancy. Even in a case of a tenancy at will, which is "an interest" within this enactment, ejectment could not be maintained, without a previous demand of possession: Colonial Bank v. Roache;[1] the mortgagee could not suddenly change a person in lawful possession into a trespasser. The mortgagor was in possession of a part only when this action was brought.

Higinbotham and Williams in support of the rule:—Possession under a tenancy at will has been held to be not adverse: Robertson v. Keith;[2] and is not under the protection of the proviso as to adverse possession. [Stawell, C.J.—The question is whether the tenant was bound to attorn to the mortgagee.] The title of the mortgagor was merely subject to the tenancy of the defendant, but that tenancy was not adverse to him. Under this enactment his rights are not preserved, unless his possession is [*464] adverse. [Stawell, C.J.—The tenant would be bound to attorn after the mortgagee had foreclosed or ejected the mortgagor; but in this case the mortgagee has not foreclosed, though he might have done so.] The last clause in Sec. 49 would be superfluous as to saving the rights of a tenant in possession, if he is in adverse possession.

Cur. adv. vult.

Stawell, C.J.—The defendant was a tenant of the mortgagor, who executed a mortgage after the commencement of the tenancy, and the Court is now to decide whether the defendant is a person who had "any rights subsisting under any adverse possession of" the land he occupied, or whether his possession was "the

[1] 1 V. R., L. 165; 1 A. J. R. 136.
[2] 1 V. R. E. at p. 15; 1 A. J. R. 14.

interest of any tenant of the land," "where the possession is not adverse." No demand of possession was made upon the defendant; he was merely asked to recognise the plaintiffs as his landlords, which he declined to do. The opinion of the Court in Robertson v. Keith,[3] seems peculiarly applicable to the present case; there it was held that the last clause of Sec. 49 prevented the certificate of title from being a conclusive bar against the interest of a tenant of the land, whose possession is not adverse.. I fully concur in that construction. The interest of the defendant, the tenant of the land, the certificate of title to which had been granted, could not of course be adverse to that of the mortgagor, his lessor; and, as the plaintiffs derive title from the same root, the defendant's possession was not adverse to their title. What further steps the plaintiffs can take to obtain possession of the defendant's land, it is unnecessary to decide; as far as the present proceedings are concerned, the defendant is entitled to remain in possession, and this rule must be discharged.

Barry, J., concurred.

Stephen, J.—The Act repealed by the "Transfer of Land Statute" was not intended originally to deal with the rights of persons in possession of land; the Act was intended to facilitate the conveyance from one owner to another. But it was thought that it could be conveniently used for that further purpose, and a practice was [*465] devised in the Office of Titles of issuing the certificates indorsed with a statement that they were subject to rights of adverse possession. That practice was approved in the present Act, and carried a little further, so that, though the certificate of title is conclusive against all other persons, with one or two slight exceptions, the rights of all persons in possession are preserved. The present case is clearly that of a tenancy, as to which nothing has been done to determine it. The

[3] 1 V. R., E. 11; 1 A. J. R. 14.

defendant had a right to refuse to attorn to the plaintiffs, and his possession was not adverse to their title.

Rule discharged.

Attorneys for the plaintiffs :—Moule & Seddon.

Attorney for the defendant :—Cresswell.

SUPREME COURT, VICTORIA, 1879.] [5 V. L. R. (L.), 167.

JONES v. PARK.

"Transfer of Land Statute" (No. 301), sec. 64—Act No. 610, secs. 2, 3—Conclusiveness of certificate of title as to right-of-way.

Where a right-of-way is specified in a certificate of title of the servient tenement, the correctness of the certificate cannot be impugned in an action for trespass.

Semble, if the parcels of the servient tenement have been erroneously described, the error should be corrected by another certificate.

Declaration for that the plaintiff was possessed of certain lands coloured red on the plan in the margin, and was entitled to a right of way from the said land over a certain close to a public highway, and back again from the said public highway over the said close to the said land, for himself and his servants on foot, etc., and the defendant wrongfully obstructed and fenced in part of the said way. Pleas : Not guilty and denial of obstruction. The verdict was for the plaintiff, with nominal damages.

The plaintiff put in a certificate of title to himself, dated 20th July, 1878, giving him a right of way, as shown on the plan in the margin ; his evidence also showed that the defendant had put up a fence, reducing the width of the way from 10 feet to 8 feet 2 inches. Evidence was rejected of what took place before the [*168] issue of his certificate, as to the right of way and its boundaries. The defendant's certificate of title, dated 19th February, 1874, was also put in by the plaintiff, showing that the defendant's fence should be 1 foot 9 inches further back from the way, and upon its face, giving the defendant a right of way as coloured red on

the plan in the margin. The plaintiff tendered the Crown grants of the land, which were objected to and rejected. There was also put in a certificate of title to one Hugh Peck, dated 30th June, 1875, and a transfer to the plaintiff, dated 10th July, 1878. The defendant tendered evidence of his occupation of a wedge-shaped piece of land, part of the plot coloured red in the defendant's certificate of title, ranging from 2 feet 8 inches wide at the one end to nothing at the other, but this evidence was rejected.

The defendant obtained a rule nisi to enter a verdict for himself on the ground that the evidence disclosed by the certificates of title of the plaintiff and defendant did not, nor did any other evidence, show that the defendant had obstructed the plaintiff's right of way; or for a new trial, on the ground of the rejection of evidence to show that the land occupied by the defendant extended up to, but not beyond, his proper N.W. and S. E. boundary as disclosed by his certificate of title.

The defendant's contention was that the plaintiff's certificate of title, by inadvertence in the Office of Titles, comprised 2 feet 3 inches too much in depth, as shown by the original deed, and by the defendant's occupation under his prior certificate of title.

Williams showed cause :—The defendant cannot be allowed to go behind his own certificate of title ; it is conclusive, above all upon him. Under Act (No. 610), Sec. 2, the statement of an easement upon the certificate of title is conclusive. Sec. 3 gives secure and indefeasible title to the right of way delineated upon the plaintiff's certificate.

Helm and Dr. Dobson in support of the rule :—Act No. 610 is incorporated with the "Transfer of Land Statute," No. 301. Of course, if the defendant's certificate is conclusive on this matter, there is nothing more to be said; but the Court will not hastily come to such a conclusion. Expressions used in an Act are not to [*169] be varied in another part of that Act, or in a subsequent Act on the same subject matter, unless a change of meaning is intended. Under Sec. 64 the cer-

tificate may give a right of way over a road coloured brown on the plan in the margin thereof. Act No. 610, Sec. 3, requires the map to be endorsed on the certificate. Strict compliance with the statute is necessary to give an indefeasible right of way. Sec. 34 of Act No. 301 requires certificates to be in the form in the 3rd schedule, directing that the registrar shall endorse the particulars of dealings, etc.; the scheduled form speaks of the land being delineated on the plan in the margin; thus a distinction is made between the margin and an endorsement. Act No. 610, Sec. 3, uses the word "endorsed." The validity of the certificate, in respect of the easement, depends upon its strict compliance with the requirements of the Act.

Per Curiam. By the Act No. 610, the Legislature, it is said, have impliedly authorised the registration of easements mentioned in that Act, whether relating to the servient, or the dominant, tenement; but as both laws, the "Transfer of Land Statute" and the amending Act, are to be read together, and as the requirements of the 34th section of the former are different from those of the 3rd section of the latter enactment—the one referring to an endorsement, the other to a plan on the margin—we are invited to infer that this power was not to be exercised. It is unnecessary to decide on the construction proper to be placed on this amending Act; but conceding that it is to have the effect contended for, and that both the sections refer to the same subject matter, the requirements of those sections may, we think, be regarded as directory, not mandatory. Certain easements may be registered; and a certificate that the person named is entitled to an easement, affords conclusive evidence that he is so entitled. We think sufficient answer may be thus given to the present objection. How an error, if really there is one, is to be corrected, we are not called upon to decide; a new certificate, with a correct description, might perhaps be issued.

Rule discharged.

Attorney for the plaintiff :—O'Halloran.
Attorney for the defendant :—A. Grant.

SUPREME COURT, VICTORIA, 1879.] [5 V. L. R. (L.) 285.

DAVIDSON v. BROWN.

Appeal—County Court—Nonsuit in deference of opinion to Judge.

Where a plaintiff in a County Court submits to a nonsuit in deference to the expression of an adverse opinion by the Judge, the propriety of such nonsuit is a question of law on which an appeal may be based.

Upon a contract for sale of land held under the "Transfer of Land Statute" (No. 301), in which the vendor undertakes to sign a transfer, the purchaser is only entitled to a transfer under the Act, and is not entitled to any abstract of title or production of documents.

Appeal from the County Court, Sale.

The plaint was by a purchaser of land under the "Transfer of Land Statute" (No. 301), upon a contract of sale by which the defendant sold the land, and undertook to sign a transfer and to pay half the costs of the transfer. The defendant paid into Court the amount of half such costs. The transfer was signed, and the possession of the land given to the plaintiff. He, however, insisted that he had a right to delivery of an abstract of title, and copies of all deeds and documents relating to the land, which were not in the defendant's possession. The Judge expressed himself strongly against the plaintiff's contention, and the plaintiff, in deference to the Judge's opinion, submitted to a nonsuit. The case stated that the plaintiff "elected to be nonsuited."

Kelleher, for the appellant, moved that the case be remitted to the Judge to amend the statement.

Per Curiam.[1] It is quite unnecessary to remit the case. A nonsuit accepted in deference to the expressed opinion of the Judge, does not prejudice the plaintiff's position on appeal; the propriety of the nonsuit then becomes a question of law. The position differs materially from that of a plaintiff who elects to be nonsuited upon a failure of his proofs.

The appeal was then argued.

Kelleher, for the appellant. [*289]

[1] Stawell, C. J., Barry & Stephen, JJ.

Williams, for the respondent, was not called upon.

Per Curiam. The transfer under the Act was all that the plaintiff was entitled to.

Appeal dismissed.

Attorneys for the appellant :—Bencroft & Smith, for Patten & Bencroft, Sale.

Attorneys for the respondent :—Willan & Sons, for Bush, Sale.

SUPREME COURT, VICTORIA, 1877.] [3 V. L. R. (L.) 36.

EX PARTE GUNN, IN RE THE "TRANSFER OF LAND STATUTE."

"Transfer of Land Statute" (No. 301), sec. 24—Power of Court to restrain registration, where caveat cannot be followed by action or suit.

The Court has jurisdiction under the Act No. 301, Sec. 24, to proceed by rule nisi and absolute to restrain the Registrar of Titles from bringing land under the Act, where no other proceedings at law or in equity are open to a caveator.

Rule nisi to restrain the Registrar of Titles from bringing certain land under the "Transfer of Land Statute."

Edwin Nott applied to the Registrar of Titles to bring certain land under the Act, and the present applicant, George Gunn, lodged a caveat against the application, as to the portion of land now in question. Gunn and Nott were owners in fee of adjoining plots, and there were disputes concerning a narrow strip along the whole depth of the land, as to the boundary between the two pieces of land. According to their respective conveyances, the boundaries were to be rectilinear. On the land itself, in some places, the buildings of one party occupied the width of this strip, and in others the buildings of the other party, so that the boundaries in fact interlocked. Both parties had been in possession of their respective allotments for more than the statutory period of limitation, though it did not appear how long the buildings had been erected. Gunn had placed

some erection beyond this disputed strip, for which Nott brought an action of trespass, as well as for trespass on the whole strip, in which he recovered judgment; this judgment was afterwards restricted by a Judge's order to the part beyond the strip. Nott then applied to the Registrar of Titles to register his land under the "Transfer of Land Statute," including the whole of the land comprised in the action of trespass. Thereupon Gunn lodged a caveat in respect of the rectangular strip.

The present rule nisi was obtained in last term, before the expiration of the caveat, on the ground that the present applicant had no other remedy; he could not bring ejectment because he was in possession of the land; nor was any remedy open to him by suit in equity in the circumstances; while if a certificate of title were to issue under the Act, and the holder of it were to [*37] obtain possession, the owner would be unable to dispossess him. The caveat would have lapsed unless some proceeding had been taken within a month.

Williams showed cause:—The only section of the "Transfer of Land Statute" (No. 301), under which it is pretended that the Court has the power to make the order now sought, is Sec. 24.[1] But it has already been decided that a Judge in Chambers has no power to make such an order, Re Power,[2] and the Court is not put on any different footing by this section; the order mentioned therein, must be of a kind which the Court or Judge could previously have made. The Court refused to act in this way in Hodgson v. Hunter.[3]

a'Beckett in support of the rule:—A jurisdiction is impliedly given by the words of the section. The actual decision in Re Power is that such an order could not be made in Chambers. In Hodgson v. Hunter[3] Molesworth, J., considered that the latter part of the section

[1] Sec. 24: "After the expiration of one month from the receipt thereof, such caveat shall be deemed to have lapsed unless the person by whom or on whose behalf the same was lodged shall within that time have taken proceedings in a Court of competent jurisdiction to establish his title . . . or shall have obtained . . . an injunction or order of the Supreme Court or a Judge restraining him (the registrar) from bringing the land under the Act."

[2] 6 W. W. & a'B. L. 81.

[3] 3 A. J. R. 13.

was not inoperative, and that an order such as now sought could be made by the Court, where a proper case should be made out. Here we have no other remedy either at law or in equity; the applicant is otherwise helpless to prevent the other party from taking away from him land to which he has a title, and of which he is in possession. The judgment in the action of trespass is in favour of Gunn, in respect of the strip of land in question; and that judgment would be inoperative if the Court cannot make this order. Sec. 152 gives the Court power to make rules and orders to regulate any proceedings to carry out the provisions of the Act, the intention being that the Court should supplement the Act where it is not sufficiently explicit. [Fellows, J.—Smeeton v. Collier[4] decides that power given to the Court may be exercised by a Judge, unless [*38] the Act conferring the power shows an intention to the contrary; so that the decision in Re Power[5] would negative jurisdiction in the Court; that case, however, was not cited.]

Williams in reply:—Re Power[5] is based on the fact that where the Act refers to a Judge in Chambers, it does so in express terms. The effect of the dictum in Hodgson v. Hunter[6] is merely that a stop might be put to the proceeding to register the land, until evidence had been taken in some proper suit; but in this case no action or suit could be commenced. No period is suggested for the desired stay of proceedings. If Sec. 24 does give the Court power to stop registration, such power will not be exercised, unless the Court can see what is to follow; it will not stop the registrar indefinitely from doing what the Act commands him to do. [Stawell, C.J.—The Court could direct issues to inform itself as to any disputed facts. Fellows, J.—Just as in the case of a warrant of attorney alleged to have been obtained by fraud.] Where the Act intends to give any new remedy, it creates it in express terms, as in Secs. 128,

[4] 1 Ex. 457; 5 D. & L. 184; 17 L. J. (Ex.) 57.
[5] 6 W. W. & a'B. L. 81.
[6] 3 A. J. R. 13.

132. As to there being no other remedy, the party in possession can himself apply to be registered as the owner, and the registrar will then have to decide between the two. To come to the facts of the case, though the affidavit on which this rule was obtained, alleges a legal title and possession in the present applicant, the answering affidavits state that the respondent is in possession and has title ; there is a direct conflict. If we are in possession, the applicant can bring ejectment. [Fellows, J.—If your title is not one which could be forced upon an unwilling purchaser, you ought not to be allowed to register. The Registrar of Titles has no jurisdiction to decide upon a caveat, inter partes, he cannot go until the caveat has lapsed.]

Stawell, C.J.—There is some difficulty in the construction of Sec. 24 ; but the intention of the Legislature seems to have been that the Court should have power to interfere in such a case as the present, and in the mode contended for by the present applicant. If it were not so, a case might arise in which there could be no redress for an undoubted injury, and no proceedings [*39] which a caveator could institute in support of his caveat, and so, with a valid objection to the applicant's title, he may yet have no means of preventing registration. I gather from the whole section an intention that the Court may stop the registrar from doing that which would conclude the rights of any party interested, until an opportunity had been afforded him of contesting the applicant's claim. If the case of Re Power conflicts with this decision, it must be considered as overruled as far as it does so.

The present rule will be made absolute to restrain the registrar from proceeding in the matter until further order. It will be for the present applicant to decide whether he will seek to have issues directed on the facts. It is not a case of costs, as the previous decision justified the opposition to the grant of this rule.

Fellows, J.—The view taken in Hodgson v. Hunter, that Sec. 24 gives this Court by implication power to proceed in this manner, is borne out by an analogous

case in which an Act made it lawful for certain persons to apply to the Court of King's Bench for a mandamus, and, thereupon, for the Court to inquire into his title, and provided what should be done if the Court should award such mandamus, without directly giving power to award it; yet the Court held that such power was impliedly conferred: R. v. Harwich.[7] The respondent's rights are not concluded; he may, if sufficiently confident in his position, convey the disputed land without regard to the claim of the present applicant, or take any other proceedings open to him outside the provisions of this Act; the present rule merely prevents him from adopting the summary procedure of the Act, in a case to which it is not properly applicable. The applicant's rights are in no wise affected by this motion.

Rule absolute.

Attorneys for the applicant:—Crisp, Lewis & Hedderwick.
Attorney for the respondent:—Abbott.

SUPREME COURT, VICTORIA, 1879.] [5 V. L. R. (L.) 157.

LOUCH v. BALL.

"Transfer of Land Statute" (No. 301), secs. 93, 94—Action by mortgagor for use and occupation.

Where the mortgagee of land, under the "Transfer of Land Statute," has not entered into possession, a transferee of the mortgagor may, without the consent of the mortgagee, maintain an action for use and occupation against a person who has been let into possession under the mortgagor after the date of the mortgage, if there be any evidence of a recognition by the defendant of the plaintiff's title.

Action on the common count for use and occupation. A verdict was entered by consent for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

The plaintiff held a certificate of title under the "Transfer of Land Statute," subject to a mortgage, she being a transferee from the mortgagor.

On 27th May, 1874, one Byrnes married, having executed a settlement of the premises in question upon his

[7] 8 A. & E. 919.

wife. On 7th January, 1875, a certificate of title issued to Mrs. Byrnes. On 26th May, 1875, a transfer having been executed by Mrs. Byrnes to her father, Fitzpatrick, a certificate of title issued to him.

On [*158] 26th September, 1876, Fitzpatrick executed a mortgage to a bank, which was registered. In October, 1876, Mrs. Byrnes died. On 16th April, 1878, Fitzpatrick executed a transfer to the plaintiff, Mrs. Louch, and on 30th April, 1878, a certificate of title issued to her, subject to the mortgage, a memorandum of which was endorsed thereon. In June, 1878, Byrnes, who was then in possession of the premises, gave up possession to the trustees of a creditor's deed then executed by him. About 1st July, 1878, the defendant agreed verbally with the trustees to rent the premises at £2 10s. a week, and then went into possession.

In July, 1878, the plaintiff's husband called upon the defendant, and, after some conversation, said he was sorry he had let the defendant into possession, to which the defendant replied that he had been put into possession by the trustees. He then asked the defendant to take the premises at £3 a week, to which the defendant replied that he would not give more than £2, and that the roof leaked ; Louch then said he would send up the plumber to repair it. For the plaintiff, it was stated that Byrnes had paid rent to her. It was alleged for the defendants that Byrnes never paid rent to anyone. On 6th July, 1878, the trustees gave to the mortgagee notice of the deed of assignment, and, on 2nd August, to the defendant not to pay rent to anyone but them. The present rule nisi was granted on the grounds that the plaintiff had not obtained the previous consent in writing of the mortgagee, as required by Sec. 94 of the "Transfer of Land Statute" ; and that no evidence of an express or implied tenancy was adduced by the plaintiff in support of this action.

Hodges showed cause :—There was ample evidence to go to a jury to sustain a verdict for the plaintiff. This form of action is not based upon any demise : Wood-

fall's Landlord and Tenant (8th Ed.), 666. In Churchward v. Ford[1] the plaintiff had no title, and therefore it was held necessary for him to prove a distinct agreement by the tenant to pay him. In Sloper v. Saunders,[2] also relied upon by the defendant, the plaintiff had no title, and no contract with the defendant. In the present case, the plaintiff has an indefeasible title ; there was a negotiation [*159] between her and the defendant, after which the defendant remained in possession. The mortgagor is not prevented from suing if the action is one which the mortgagee could not have maintained. Sec. 84 of the Act No. 301, allowing a mortgage of land under the Act, provides that the mortgagee shall not be the legal owner, for it enacts that the mortgage shall not operate as a transfer. Though Sec. 93 gives the mortgagee the same remedies as he would have had if the legal estate had been vested in him, that would not enable him to sue a tenant of the mortgagor who became such after the mortgage ; his only remedy against such tenant would be to treat him as a trespasser, unless the tenant entered into a new contract with him : Moss v. Gallimore[3] in notes, citing Evans v. Elliot.[4]

Molesworth in support of the rule :—There is no evidence of anything amounting to an attornment by the defendant to the plaintiff, or a new contract between them ; there is nothing but a fruitless negotiation, in which they remained at arm's length. The defendant was put in possession by the trustees as strangers to the plaintiff and had occupation, and he was warned by them not to pay anyone else. A mere wrongdoer could defeat this action : Cripps v. Blank ;[5] and the defendant is in a much stronger position. There should have been some evidence of a holding by him by the permission of the plaintiff : Tew v. Jones,[6] instead of which it was shown that the defendant held contrary to

[1] 2 H. & N. 446; 26 L. J. (Ex.) 354.
[2] 29 L. J. (Ex.) 275.
[3] 1 Smith's L. C. (5th Ed.) at p. 550.
[4] 9 A. & E. 342.
[5] 9 Dowl. & Ry. 480.
[6] 13 M. & W. 12.

the plaintiff. The plaintiff could not, by giving the notice, make a contract between her and the defendant: Churchward v. Ford,[7] per Pollock, C. B. Under the "Transfer of Land Statute," neither the mortgagor nor his transferee can sue without the previous consent in writing of the mortgagee; under Sec. 93 a mortgagee could maintain this action as there was money owing on the mortgage; he can bring any action which the owner could, so long as there is any money owing. The defendant had notice not to pay rent to the mortgagor. The proof of the existence of a mortgage nonsuits the plaintiff, unless, under Sec. 94, he proves a [*160] consent in writing by the mortgagee. The mortgagee is, as long as the money is unpaid, practically the owner of the land. [Stawell, C.J.—That will not prevent the mortgagor from suing for use and occupation before the mortgagee enters into possession.]

Per Curiam. No attornment is necessary. A recognition by the defendant of the plaintiff's title, with proof of occupation, would be sufficient to sustain the present action. There was some evidence of such recognition and occupation, on which a jury might properly have acted. The powers conferred by Sec. 93 of the "Transfer of Land Statute" upon the mortgagee do not prevent the mortgagor from maintaining an action for use and occupation before the mortgagee enters into possession. No consent in writing of the mortgagee was necessary in this instance, for the mortgagee himself could not have brought the present action; the mere subsequent recognition of the mortgagee by the defendant would not have enabled him to do so, for he had previously recognized the mortgagor, and was indebted to him for the occupation he had already enjoyed; proof of the mortgage would not have nonsuited the plaintiff. The case does not fall within the purview of the statute. The rule must be discharged.

Rule discharged.

Attorneys for the plaintiff:—Davies & Strongman.
Attorney for the defendant:—Sievwright.

[7] 2 H. & N. 446, 26 L. J. (Ex.) 354.

VICTORIA, 1870.—STAWELL, C.J.] [1 V. R. (L.) 86.

WILKINSON v. BROWN.

"Transfer of Land Statute"—Certificate of title—Evidence.

A duplicate certificate of title under the "Transfer of Land Statutes" is admissible as prima facie evidence of title in ejectment.

At the trial of an action of ejectment, the plaintiff tendered as evidence of his title a duplicate certificate of title under the "Transfer of Land Statute." It was objected for the defendant that the duplicate certificate was inadmissible, and that the original certificate in the registrar's book should be produced as the best evidence, and the only conclusive evidence under the statute. The objection was overruled, and a verdict was entered for the plaintiff.

Molesworth now moved for a rule nisi to enter a verdict for the defendant on the ground of the improper reception of this evidence, and that the defendant had proved an adverse possession for more than fifteen years, as to which latter ground leave had been reserved at the trial.

Stawell, C.J.—The "Transfer of Land Statute," Sec 47, enacts that the certificate shall be conclusive evidence, but it does not declare that the duplicate original shall not be prima facie evidence—as it may be altered or there may be two duplicates—and the certificate alone is made conclusive evidence. But of what use is the duplicate if it is no evidence? To grant a rule would only be to throw doubt on a matter on which we entertain no doubt. We are of the opinion the duplicate certificate affords some evidence of title.

Rule granted only on the ground of adverse possession.

Attorney for plaintiff:—O'Brien.

Attorney for defendant:—Wilkinson.

SUPREME COURT, VICTORIA, 1871.] [2 V. R. (L.) 111.

IN THE MATTER OF THE "TRANSFER OF LAND STATUTE," AND IN THE MATTER OF HENRY GEORGE WISE.

"Transfer of Land Statute" (No. 301), sec. 117—Caveat—Order to delay registering—Jurisdiction.

A Judge's order under the "Transfer of Land Statute," Sec. 117, to delay registering a transfer did not shew upon the face of it, nor did it appear upon the affidavits upon which the order was drawn up, that the order had been made within fourteen days after notice to the caveator.

Held, that the order was bad, and rule nisi to set it aside made absolute.

Rule nisi to set aside an order of Molesworth, J. The order sought to be set aside was made under the "Transfer of Land Statute," Sec. 117, on the 25th April, 1871. The order as drawn up was that upon reading certain affidavits, and hearing counsel for the London Chartered Bank of Australia, upon Edwin Brett, the manager of the bank, giving an undertaking to indemnify to the extent of £200 any person against any damage that might be sustained by reason of any disposition of certain land specified in the order, being delayed, and upon such undertaking being lodged with the associate, the learned Judge did order and direct the Registrar of Titles to delay registering any person as transferee or proprietor of or registering any dealing with said land or any part thereof, for six months from the date of the order.

[*122] The affidavits on which the order was based, shewed that in January, 1870, Mr. G. H. Hayes, a miller, gave the bank a lien over the land (which was registered under the statute) by way of equitable mortgage; that in November, 1870, the bank lodged a caveat forbidding dealing with the land; that on 11th January, 1871, the bank instituted a suit in equity—London Chartered Bank v. Hayes[1]—to enforce their equitable mortgage; that on the 31st January, 1871, the land was sold by the sheriff of Ballarat under an execution: Griffiths v. Hayes;

[1] 2 V. R. Eq. 104.

that one of the bank officials attended the sale, and read a notice of the bank's lien, cautioning purchasers ; that Wise (a clerk of Hayes') bought for £200; that the sheriff signed a transfer on the 9th February, and that this was on 3rd April, 1870, lodged in the Office of Titles.

J. W. Stephen and Holroyd shewed cause :—There was no appeal from the decision of the Judge. The extension of time to be given under Sec. 117 is a matter within his discretion : Shortridge v. Young,[2] Brown v. Bamford,[3] Waring v. Smith.[4] If the order be wrong it is a mere nullity, and does no harm ; it gives no title to anyone, and there is therefore no advantage gained by setting it aside.

Bunny, Finn and Webb for the rule :—The caveator has only fourteen days after notice to him within which to apply to a Judge. After that time the caveat lapses, and no order can be applied for. It does not appear either on this order or on the affidavit upon which it was drawn up that the order was made within the fourteen days. On the contrary, it appears that the transfer was lodged on the 3rd April, and it is to be presumed that the notice was given by the office forthwith, yet the order was not made until the 25th April. When a Judge exercises a new statutory jurisdiction all that is necessary to give jurisdiction should appear on the face of the order. In making this order the Judge did not act as a Judge of the Supreme Court, but under special powers which might have been conferred on the prothonotary or some other officer. Therefore the order ought to show all the matters necessary to give jurisdiction, and one of these was that the order was made within the fourteen days: Christie v. Unwin.[5] [*113]

Stawell, C.J.—I think this objection is fatal ; the jurisdiction ought to have appeared on the order.

[2] 12 M. & W. 5.

[3] 9 Ib. 42.

[4] 10 Jur. 924.

[5] 11 A. & E. 373.

Barry, J.—I am of the same opinion. When an order refers to affidavits and the facts to sustain it sufficiently appear in those affidavits, I think that would be sufficient. But here the affidavits do not shew the facts necessary to sustain the order.

Rule absolute.

Attorney for applicant:—Samuel.

Attorneys for respondent:—Bennett & Attenborough.

VICTORIA, 1871.—STAWELL, C.J.] [2 V. R. (L.) 39.

MILLER v. MORESEY.

"Transfer of Land Statute," sec. 118—"Land Act, 1865," sec. 22—Certificate of title—Regulation.

A., an uncertificated insolvent, became lessee of an allotment under the "Land Act, 1865." His official assignee was registered as the proprietor under the "Transfer of Land Statute," but was not registered under the "Land Act." The assignee transferred to B., who registered this transfer under both Acts, and procured a certificate of title. In ejectment against A. by B., where plaintiff proved these facts,

Held, that if plaintiff had relied on his certificate of title alone he might have succeeded; but as he went outside the certificate, and thereby showed he had not the legal estate, he must be nonsuited.

Ejectment.—Moresey, an unregistered insolvent, became lessee of an allotment under Part II. of the "Amending Land Act, 1865." Simson, his official assignee, was registered as proprietor, under a Judge's order, made under Sec. 118 of the "Transfer of Land [*40] Statute." Simson sold and transferred to the plaintiff, who obtained a certificate of title under the "Transfer of Land Statute." The transfer from Simson to Miller was registered at the office of the Board of Land and Works, under Sec. 22 of the "Amending Land Act, 1865." The transfer to Simson, by operation of law, was not so registered. At the trial the plaintiff put in his certificate of title, and also the Judge's order and lease, with endorsement of registration of transfer under the Land Act. The defendant moved for a nonsuit on the ground

of non-registration of the transfer by operation of law to Simson. A verdict was entered for the plaintiff, with leave to the defendant to move to enter a nonsuit. A rule nisi for a nonsuit was obtained on the ground that there was no evidence of registration of any transfer from defendant to Simson, and that the order under which Simson was registered as proprietor was ultra vires.

Higinbotham, T. a'Beckett and Box shewed cause :—The Court cannot go behind the certificate of title, which is conclusive evidence under the statute. The force of this evidence cannot be affected by other evidence put in with it, which is mere surplusage. The decision in The Queen v. The Board of Land and Works[1] shows that notwithstanding Sec. 22 of the Land Act the official assignee is entitled to the insolvent's lease without his personal attendance to register the transfer. The registration of such a transfer under Sec. 22 of the Land Act is therefore unnecessary, the sole object of the section being to secure the personal attendance of the transferee.

Ireland, Q.C., and Hood for the rule were not called in.

Stawell, C.J.—If the plaintiff had rested his case merely on the certificate of title, he could not have been nonsuited. But he chose to go further, and produced evidence which shewed he had not the legal estate, but that the estate was in some one else. He must, therefore, be nonsuited.

Rule absolute for nonsuit.

Attorneys for plaintiff :—Vaughan, Moule & Seddon.

Attorney for defendant :—Cleverdon, for Cresswell.

[1] 6 W. W. & a'B. L. 38.

VICTORIA, 1871.—BARRY, A.C.J.] [2 V. R. (L.) 193.

MILLER v. MORESEY (SECOND CASE).

Ejectment—Lease—Certificate of title—Evidence—No. 301, sec. 159.

Section 159 of the "Transfer of Land Statute" (No. 301) does not affect the conclusive character, as evidence for plaintiff in ejectment, of a certificate of title to a lease under the "Amending Land Act, 1865."

Ejectment for land demised by the Crown under the "Amending Land Act, 1865."

After a nonsuit in a former action between the same parties for the same land (reported ante p. 436), the plaintiff obtained from the Registrar of Titles a new certificate of title in substitution for that produced in the former action. In this action the plaintiff put in the certificate so obtained, and gave no other evidence. The defendant proved that when he obtained the lease of the land included in the certificate he was an uncertificated insolvent, and that he had never transferred the lease. The jury returned a verdict for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit; and a rule nisi was obtained accordingly.

Higinbotham, a'Beckett and Box shewed cause:—Sec. 159 of the "Transfer of Land Statute" does not affect the conclusive character of a certificate of title. The only object of the section is to prevent the statute relaxing the restrictions on alienation imposed by the "Amending Land Act, 1865," and to forbid the registration of transfers in violation of its provisions. When a certificate of title is granted, it is conclusive evidence, and it is immaterial by what means the certificate was obtained, except in case of fraud. The judgment on the former action concludes the present.

[*194] Ireland, Q.C., and Hood for the rule:—The defendant having become lessee as an uncertificated insolvent, is still entitled to the lease, under the "Land Act, 1865," as nothing has been done since the issue of

the lease, which could, by operation of law or otherwise, transfer the lease to any other person. The lease is inalienable under the "Land Act," and by Sec. 159 of the "Transfer of Land Statute," the provisions of the statute are expressly subject to those of the Act. Sec. 49 of the statute enables the defendant to go behind the certificate in this instance to show irregularity in its issue, as it has not issued upon any application to bring land under the Act, or upon any transmission as defined in Sec. 4.

Barry, A.C.J.—The Act of Parliament under which the certificate issues declares the certificate to be evidence of certain facts; it is not necessary to prove the preliminary steps taken to procure the certificate. As regards the title to the estate the certificate is made conclusive evidence that the person named in it is proprietor in case of freehold, and lessee in the case of leasehold. This has been put so clearly on several occasions when the question has been before us, that it is not necessary to do more now than adopt the expression of the Chief Justice in a former argument in the same case where the plaintiff failed:—"If the plaintiff had rested his case merely on the certificate of title he could not have been nonsuited." On the former occasion the plaintiff was not content, but fortified himself, as he imagined, by going into evidence prior to the title. On this occasion he rests on the certificate, and the defendant goes into the other evidence; but that cannot prejudicially affect the plaintiff's title. We think the certificate is conclusive evidence of title; and that the plaintiff resting on it alone cannot be nonsuited.

Rule discharged.

Attorneys for plaintiff:—Vaughan, Moule & Seddon.

Attorney for defendant:—Cleverdon, for Cresswell.

VICTORIA, 1887.—WEBB, J.] [13 V. L. R. 93.

McCLUSKEY v. FRAME.

Practice—Supreme Court—"Transfer of Land Statute," secs. 116, 117—Caveat—"County Court Statute, 1869," sec. 100 (III. & VIII.)—County Court jurisdiction—Costs.

Quære, whether the County Court has any jurisdiction to deal with matters arising out of caveats lodged under the "Transfer of Land Statute."

The question of costs being entirely in the discretion of the Court, the Court will not limit them to County Court costs in an action in support of a caveat under the "Transfer of Land Statute," even assuming that the County Court would have had jurisdiction to hear the case.

Action by Peter McCluskey against Johanna Frame, A. C. Groom, and the Registrar of Titles, claiming that the plaintiff was entitled to be registered as mortgagee of certain land in the parish of Calibau, county of Talbot. The defendant Johanna Frame, in March, 1884, gave to the plaintiff an equitable mortgage over the land, on which a sum of £28 5s. was now due. Subsequently to getting the mortgage the plaintiff lodged a caveat in the Titles Office against any dealings with the land without notice to him. In July, 1886, the defendant [*94] Johanna Frame, executed a legal mortgage of the property to the defendant Groom to secure a sum of £200 advanced by him, and an application was made to the Registrar of Titles to have this mortgage registered. The plaintiff opposed the application, and brought the present action in support of his caveat and to restrain the Registrar of Titles from registering the mortgage to Groom. A written consent to judgment signed by the solicitors of the plaintiff and defendants was produced, and it proposed, among other matters, to refer the question of the costs of the action into Chambers.

Skinner, upon this consent, moved for judgment in terms of the consent. There seems to be some doubt whether the solicitors for the parties can consent to judgment because of Order XLI., r. 9.

[Webb, J.—That rule seems to be expressly directed against it. This is however another question. The parties have no power to refer into Chambers the question of costs.]

Then the case must proceed. [The statement of claim was then proved.]

No appearance for any of the defendants.

Webb, J.—Order the defendant Mrs. Frame to execute a legal mortgage of the property to the plaintiff, and order the Registrar of Titles to register it when executed, in priority to the mortgage of Mr. Groom. Order the defendant Mrs. Frame to pay the plaintiff's costs of action.

Higgins, for the defendant Mrs. Frame, now applied that the order as to costs should be varied by giving County Court costs only, inasmuch as the action was to enforce an equitable mortgage for £28 5s. only. There is no doubt that the action could have been brought in the County Court under Sec. 100, sub.-secs. (III.) and (VIII.) of the "County Court Statute, 1869" (No. 345). Before the Judicature Act, costs would have been taxed by the taxing master on the County Court scale, under Sec. 104. But that section has been repealed by "The Judicature Act, 1883" (No. 761), Sec. 2, and costs are now under that Act in the absolute discretion of the [*95] Court (Order LXV., r. 1), and the taxing officer could not deal with the question except under an express direction of the Court. But the Court, in exercising its discretion, will have regard for the former practice: Myers v. Defries.[1] If this matter had been brought before the Court at the hearing, the Court would have given County Court costs only.

[Webb, J.—Could the County Court restrain the Registrar of Titles ?]

It is submitted that it could under Sec. 100 of the "County Court Statute, 1869" (No. 345), which gives the Court all the powers of the Supreme Court up to

[1] 5 Ex. D. 15 & 180; 49 L. J. (Q. B.) 266.

£500 in actions to enforce a charge or lien [sub.-sec. (III.)] or in all proceedings for orders in the nature of injunctions [sub.-sec. (VIII.)]: Patchell v. Maunsell.[2]

Skinner for the plaintiff :—It is submitted that since the repeal of Sec. 104 of the "County Court Statute, 1869," this matter is entirely in the discretion of the Court under Order LXV., r. 1, except in cases of contract where, by r. 12 of that Order, County Court costs are only to be given in actions founded on contract when the plaintiff recovers £50 or less. Myers v. Defries, cited contra, is an authority only for the proposition that the old practice will be regarded in apportioning the liability for costs between the parties. Besides, Sec. 100, sub.-sec. (III.) of the "County Court Statute, 1869" (No. 345), does not apply to cases involving any difficulty : Murphy v. Mitchell ;[3] and this was a case involving the practice of the Titles Office of very great difficulty until the point which arises in the case was recently decided by the Full Court in National Bank v. Morrow.[4]

Webb, J.—In this case application is made on behalf of the defendant that I should, in giving judgment for the plaintiff with costs, limit those costs to County Court costs. The action is brought for the specific performance of a contract by which the defendant Frame agreed to give to the plaintiff a mortgage under the "Transfer of Land Statute" to secure a sum of money lent. [*96] A caveat was lodged by the plaintiff with the Registrar of Titles under Sec. 116 of the "Transfer of Land Statute," and this action is brought in aid of that caveat, and to restrain the registrar from registering a mortgage to the defendant Groom. I have very considerable doubt whether the County Court would have jurisdiction to entertain such an action. The caveat is lodged under Sec. 116 of the "Transfer of Land Statute" (No. 301), and Sec. 117 provides that :

[2] 7 V. L. R. Eq. 6.
[3] 8 V. L. R. Eq. 194.
[4] 13 V. L. R. p. 2.

"Upon the receipt of such caveat the registrar shall notify the same to the person against whose application to be registered as proprietor or (as the case may be) to the proprietor against whose title to deal with the estate or interest such caveat has been lodged, and such applicant or proprietor may if he think fit summon the caveator to attend before the Supreme Court or a Judge in Chambers to show cause why such caveat should not be removed."

This express jurisdiction is given only to this Court or a Judge of this Court in Chambers. There is no provision with regard to caveats against dealings with land already under the Act, similar to that with regard to caveats against bringing land under the Act. But I may look at the provisions as to the latter caveats to interpret the course to be taken under the former. Where a caveat is lodged against bringing land under the Act, Sec. 24 provides that "after the expiration of one month from the receipt thereof such caveat shall be deemed to have lapsed unless the person by whom or on whose behalf the same was lodged shall," among other things, "have obtained and served an injunction or order of the Supreme Court or a Judge restraining him from bringing the land under this Act." Therefore, if it were a caveat against bringing land under the Act, the only injunction to restrain the Registrar of Titles would be the order of the Supreme Court or a Judge. In cases under Sec. 116 there is no mention of an injunction against the Registrar of Titles, but there is a provision for having the caveat removed, and there the application must also be to the Supreme Court or to a Judge. I do not think, therefore, that it was the intention of this Act that the County Court should have jurisdiction to deal with matters arising out of any caveats under this Act; but I do not desire to decide that authoritatively.

Even if the County Court has jurisdiction, the question of costs is entirely in the discretion of the Court, and I should not be [*97] disposed in a case arising out of a caveat under this Act to limit the costs to County

Court costs. I will make no order as to County Court costs in this case ; the order I have already made will stand, and this application will be refused with costs.

Solicitor for plaintiff:—G. Skinner.

Solicitor for defendant:—Herald.

SUPREME COURT, VICTORIA, 1869.] [6 W. W. & a'B. (L.), 233.

IN RE WOODS AND THE "TRANSFER OF LAND STATUTE."

A conveyance of real estate purported to be executed under a power of attorney previously registered. Held, that in order to shew a good title evidence must be given that the principal was alive at the date of the registration of the power.

Summons calling on the Registrar of Titles to substantiate and uphold the grounds of his direction not to register, under the "Transfer of Land Statute," the land the subject of the application.

The objection taken by the registrar to registering the land is stated in the following case :—

"1. On the 18th April, 1860, Daniel Owen was the mortgagee in fee of Crown allotment 10 of Sec. 7, town of Warrnambool. 2. On the 3rd September, 1862, a reconveyance of such allotment was purported to be executed by him by his attorney John Davies, constituted by a power of attorney not given for valuable consideration, dated the 23rd of May, 1860, and filed on the 1st September, 1862. 3. Application has been made to bring the allotment under the operation of the "Transfer of Land Statute," and evidence has been required that Daniel Owen was alive on the 1st of September, 1862, but compliance with such requisition is refused. 4. Direction has been given not to register the land, and in compliance with a requisition in this behalf, and pursuant to the 135th section of the said statute, the following is stated as the ground upon which such direction was given :—That evidence is requisite to show that Daniel Owen's power of attorney continued and

was in force on the day whereon it was filed. Above is the ground upon which the direction mentioned in paragraph 4 was given.

"Thos. Sunderland,

"Asst. Registrar of Titles."

[*234] J. W. Stephen, for the applicant ; Holroyd, for the registrar.

Cur. adv. vult.

Stawell, C.J.—The point in this case could not be put more summarily for the applicant than it was on the argument. It is simply whether it is competent to file a power of attorney given by a dead man. In whatever way the case is viewed there is difficulty, and that difficulty arises from the 95th and following sections of the "Instruments and Securities Statute." That section enacts that "every power of attorney heretofore made, or hereafter to be made, shall continue in force until the death, bankruptcy, or insolvency of the principal, or the revocation of such power shall have been registered as hereinafter mentioned." The applicant relies on these words, and urges that whatever the Legislature may have meant, their intention is to be deduced solely from the words used, and that they have declared every power shall continue in force till the death or bankruptcy of the maker has been registered, and the words, if taken by themselves, certainly convey that meaning. But the whole of the Act must be considered if there is any dispute as to the meaning of any particular part of it. A subsequent portion of the same section declares that "Every Act within the scope of the powers and authority conferred upon him which shall hereafter be done, performed or submitted to by the attorney after such death, bankruptcy, insolvency or revocation as aforesaid and before registration thereof as hereinafter mentioned shall, in favor of any person who shall bona fide and without notice of such death, insolvency, bankruptcy, or revocation have dealt with such attorney in the name of his principal, be as effectual in all respects as if such death, bankruptcy, insolvency or revocation had not happened or been made."

In other words, the first [*235] portion of the section, in general terms, declares that every power shall continue in force till the death of the maker has been registered, while the subsequent part of the section declares that every act done after the death and before the registration shall be valid in favor of a certain limited class—namely, those who have bona fide and without notice of the death dealt with the attorney. Subsequent parts of the Act point to a desire on the part of the Legislature that every power of attorney shall be filed or registered. Sec. 98 renders it imperative in certain cases to file the power before any deed under it can be executed, otherwise the deed is void. Sec. 99 enacts that the fact of the death, bankruptcy or insolvency of the principal, or the revocation of the power, shall be filed in the same manner as powers of attorney are directed to be filed, and shall be annexed to the power to which it relates. According to that section, the power must be filed before the revocation is filed ; for the revocation cannot be annexed to a power in the registrar's office if the power has not been already filed there. If this were not so, notice would be given to the world that a power of attorney had been revoked when the public did not know that any such power had been given. The "Transfer of Land Statute," Sec. 113, certainly contemplates that a revocation may be filed at any time within four months before the power is filed. How that difficulty is to be got over it is unnecessary now to decide ; but apparently the Act subsequently passed does assume that it is possible to file a revocation before the power itself has been filed. According to the sections we are now considering, however, we are of opinion that, in order to enable the revocation of a power to be annexed to a power, the power itself must be filed. We think the sound construction is, that the first portion of Sec. 95 is to be read as explained by the subsequent portion. In that way all parts of the same section are consistent with the subsequent sections of the Act. We think we should be doing [*236] violence to the words of the whole section if we adopted the con-

struction contended for by the applicant. We therefore think the registrar was right in the view that he took, and that the summons must be dismissed.

Summons dismissed.

VICTORIA, 1865.—STAWELL, C.J.] [2 W. W. & a'B. (L.) 110.

IN THE MATTER OF THE "REAL PROPERTY ACT"

AND

IN THE MATTER OF CHARLES WILLIAMSON.

A Judge in Chambers has no jurisdiction to entertain a summons by a person seeking to bring property under the "Real Property Act," calling upon a caveator to show cause why his caveat forbidding the bringing of such property under the Act should not be removed. Section 81 of the Act (No. 140) authorizes such a summons only in the case of caveats against dealing with property already under the Act.

Summons by Charles Williamson, under the "Real Property Act" (No. 140), calling upon Henry Budge and others to shew cause why a caveat lodged by them, forbidding the bringing under the Act of certain land which Williamson had applied to have brought under the Act, should not be removed.

Holroyd, for the caveators, took a preliminary objection to the summons. The Act only gives jurisdiction to a Judge in Chambers in the case of caveats lodged under Sec. 80, in respect of land already brought under the provisions of the Act; and not in the case of caveats lodged under Sec. 21, against bringing land under the provisions of the Act. The only section which authorises a summons before a Judge in Chambers is Sec. 81, and that only speaks of "such caveats" referring exclusively to caveats under the immediately preceding section.

Webb, for the applicant proprietor:—The provisions as to lodging caveats are in Secs. 21 and 80 respectively; the former relating exclusively to applications to bring land [*111] under the Act, the latter exclusively to deal-

ings with land already under the Act. But Sec. 81, which is under the head of "General Provisions," requires the Registrar-General, upon the receipt of "such caveat," "to notify the same to the person against whose application to bring land under the provisions of this Act, or to be registered as proprietor, or, as the case may be, to the registered proprietor against whose title to deal with land under the provisions of this Act such caveat has been lodged, and such applicant proprietor, or registered proprietor, may if he think fit summon the caveator before the Supreme Court or a Judge, to shew cause why such caveat should not be removed." The reference here to caveats against bringing land under the provisions of the Act, and the provisions enabling the "applicant proprietor" to summon the caveator shew that this clause is intended to apply as well to caveats lodged under Sec. 21 as to caveats lodged under Sec. 80. The expression "applicant proprietor" throughout the Act is used only in reference to a proprietor seeking to bring land under the Act, the term "registered proprietor" being applied to all proprietors of land under the Act; and therefore Sec. 81 gives jurisdiction to a Judge in Chambers in the case of a proprietor seeking to bring land under the Act wishing to have a caveat against him removed; and that is the case of the present applicant.

Stawell, C.J.—No doubt Sec. 81 is to some extent inaccurate in its use of the term "applicant proprietor," but I do not think it could have been the intention of the Legislature to give jurisdiction to a Judge in Chambers to deal with matters of such vast importance as might arise under a caveat against the first bringing of land under the operation of the Act. By Secs. 22 and 23 a certain course is pointed out in the case of caveats under Sec. 21, and the caveator has three months given him in which to take such steps as he may think proper. If he do nothing in that time his caveat lapses. After having made such a clear provision in those sections, I do not think the Legislature could have intended that the proceeding on a summons before a Judge in Chambers

should apply to caveats under Sec. 21. I at first felt some difficulty from the language of Sec. 81, which would in its terms appear to apply to such caveats; but that difficulty vanishes altogether when I see the momentous consequences, and possible injury, which might result to the parties from holding that a title was to be dealt with in such a summary manner. I do not think it a case for costs.

Summons dismissed without costs.

SUPREME COURT, VICTORIA, 1891.] [17 V. L. R. 703.

MUNRO & BAILLIEU v. ADAMS.

"*Transfer of Land Act, 1890*" (*No. 1149*)—*Lessor and lessee—Covenant not to sub-let without lessor's consent—Sub-lease without consent—Covenant to pay rent—Sub-lease not registered—Action to recover rent—Subsequent registration of sub-lease—Use and occupation.*

[*703] Certain town premises, under the "Transfer of Land Statute," were demised by the proprietor for a term of years, the lease containing a covenant that the lessees would not under-let or part with the possession of the premises without first obtaining the consent in writing of the lessor, and if the lessees failed to perform or observe such covenant the lessor might enter upon the premises and expel the plaintiffs and all other tenants and occupiers therefrom. The lessees, without having first obtained the consent in writing of the lessor, by a lease, bearing date the 13th March, 1890, sub-let a portion of the premises to the defendant for a term of five years and ten days from the 15th March, 1889, at a yearly rental of £1,000, payable quarterly. The lessees brought an action against the defendant, alleging that by such sub-lease the plaintiffs sub-let the premises to the defendant; that on the 8th February, 1890, the defendant paid £250 on account of the rent due by him under the sub-lease, but had refused to pay the balance, which they claimed; and, alternately, they claimed for the use and occupation of the premises from the 1st March, 1889, at the rate of £1,000 per annum. The defendant, by his defence, alleged that the plaintiffs had not and could not obtain the consent in writing; that the premises were under the "Transfer of Land Statute," and the alleged sub-lease had not been registered, and would not be registered without such consent, and that there was no agreement on his part to pay for the use or occupation of the premises, and that he did not occupy them except in pursuance of an agreement dated on or about the 1st March, 1889, by which the plaintiffs agreed to sub-let the premises to him as from the 15th March, 1889, at a rental of £1,000 per annum, and in

expectation of a sub-lease in accordance with such agreement, which the plaintiffs could not give, and he counter-claimed for specific performance of such agreement or damages £2,000. By their reply, delivered on the 24th September, 1890, the plaintiffs alleged that the defendant entered into possession of the premises well knowing that the consent in writing of the proprietor might not be obtained, and on or before the 10th April he became aware that the proprietor would not give such consent, and, with such knowledge, he had remained in possession, and was thereby estopped from raising the above defences. On the 30th September, 1890, the defendant put in a rejoinder joining issue. On the 27th February, 1891, the plaintiffs amended their reply, [*704] alleging that on the 22nd January, 1891, the proprietor of the premises duly consented in writing to the lease from the plaintiffs to the defendant, and that it was duly registered on the 28th January, 1891.

Held, by Webb, J., that even though the lease might be inoperative under the "Transfer of Land Statute" because not registered, the covenant by the defendant to pay rent contained in such lease was operative, and the plaintiffs should therefore recover the amount of rent owing.

On appeal to the Full Court,

Held, that the plaintiffs were entitled to hold such judgment on their claim for use and occupation as, at the date of the commencement of the action, their claim for use and occupation was not merged in the sub-lease, and, if it were afterwards when the sub-lease was registered, such merger was not pleaded as a defence.

Held, also, on the counter-claim, that specific performance having been given before the trial the defendant was not entitled to judgment therefor, and could not recover on the alternative claim for damages.

Action by Munro & Baillieu against George Hill Adams for the recovery of rent.

The statement of claim alleged that by a sub-lease, dated 13th March, 1890, the plaintiffs sub-let to the defendant all the store and warehouse in Manchester Lane, Melbourne, erected on the land coloured blue in the map in margin thereof, and also the basement floor of the warehouse or shop erected on the land coloured red in such map, together with a certain right of carriage way therein mentioned, reserving to the sub-lessors the right to use, occupy, and enjoy a space not exceeding 12 feet by 24 feet on the first floor of the said premises, with certain rights of passage mentioned, to be held for a term of five years and ten days from the 15th March, 1889, at the yearly rental of £1,000, payable by equal quarterly payments on 25th June, 25th September, 25th December, and 25th March in each year. On the 8th February, 1890, the defendant paid the plaintiffs £250 on account of the rent due by him to them under this sub-lease. This was all the defendant had paid, and he had

refused to pay the balance, which the plaintiffs now claimed, with interest at 6 per cent. per annum.

The plaintiffs alternatively claimed for use and occupation of the premises from the 1st March, 1889, to the date of payment or judgment, at the rate of £1,000 per annum.

The defence alleged that in the lease made by the proprietor of the premises to the plaintiffs, the plaintiffs covenanted not to under-let or part with the possession of the premises, or any part thereof, without the consent in writing of the proprietor first obtained, and it was provided that, [*705] if the plaintiffs failed to observe or perform that covenant, it should be lawful for the proprietor to enter upon the premises, and expel the plaintiffs and all other tenants and occupiers therefrom. The plaintiffs had not, and could not, obtain such a consent in writing. The premises were under the "Transfer of Land Statute," and the alleged sub-lease had not been registered, and would not be registered without such consent as aforesaid.

As to the alternative claim for use and occupation, the defendant alleged that there was no agreement on the part of the defendant to pay for use and occupation; further, the defendant did not occupy the premises, except in pursuance of the agreement mentioned in the counter-claim and in expectation of a sub-lease in accordance with the said agreement, and the plaintiffs could not give a valid sub-lease.

The defendant counter-claimed, alleging that by agreement, dated on or about 1st March, 1889, the plaintiffs agreed with the defendant to under-let to him the premises as from 15th March, at a rental of £1,000 per annum, and he claimed specific performance thereof, or damages £2,000.

By the reply delivered on 24th September, 1890, plaintiffs, besides joining issue, stated that they would object in law that the allegations of the defence, even if true, afforded no answer; first, because the defendant, being tenant to the plaintiffs, could not dispute the plaintiffs'

title as landlords ; secondly, it was not alleged that the proprietor had entered the premises and expelled the plaintiffs or any other occupiers therefrom by reason of the alleged breach of covenant, or at all. Further, the defendant entered into possession well knowing that the consent in writing of the proprietor might not be obtained to such sub-lease, and he became aware on or before the 10th April, 1889, that the proprietor would not give such consent in writing, and he had with such knowledge ever since remained, and was then in possession, and the plaintiffs would object that he was thereby estopped from raising such defence. They would also object in law that it was not necessary, in order to support the plaintiffs' claim, that the sub-lease should be registered.

On the 27th February, 1891, the plaintiffs delivered an amended reply, alleging that on the 22nd January, 1891, the proprietors of the premises, namely, the Fourth Victorian Permanent Building Society, [*706] duly consented in writing to the lease from the plaintiffs to the defendant, and that the lease or sub-lease was duly registered on the 28th January, 1891.

The various allegations of fact made by the plaintiffs and defendant were supported by evidence.

Fink and Topp for the plaintiffs.

Higgins for the defendant.

Fink in reply.

Webb, J.—This is an action by Munro & Baillieu against Adams to recover rent, and it is based on a sub-lease dated the 13th March, 1890, by which the premises were demised at a rent of £1,000, payable by quarterly payments of £250. In support of the plaintiffs' case, a lease has been put in dated the 13th March, 1890, by which the plaintiffs demised to the defendant certain premises at a yearly rent of £1,000. It does not appear when this lease was signed, therefore I assume that it was signed at its date. The answer which the defendant makes is :—"You are not entitled to recover, because at the date of the issue of the writ this was not

registered, and it could not be registered until the superior lessor had granted his consent ; therefore, under the 'Transfer of Land Statute,' the lease did not operate." If this lease depended on the operation of the "Transfer of Land Statute," I might have to consider that, but I find it is an express covenant by the defendant that he will pay this rent on the days and at the times mentioned. It may be that until the registration this lease did not complete the lessee's title, but I find that he occupied, and I find an express covenant to pay the rent, and, therefore, although not registered, it confers a right of action for the rent.

In fact, this case is on the same footing as several cases under the old Bills of Sale Acts, where it has been held that a bill of sale as between the parties to it is a binding and effectual document, though it may be void as to third parties. It would be monstrous to say when the lessee could not sub-let without the consent of his lessor, [*707] if he did actually sub-let by a document which purported to demise the premises, and the sub-lessee went and occupied the premises, the landlord refusing to consent but not interfering, that in such a case as that the sub-lessee could occupy year after year and say, "I won't pay a penny of rent, because the sub-lease has not been assented to." Therefore the plaintiffs are entitled to recover as on the covenant in this lease. The writ was issued on the 9th June, 1890. The covenant was to pay by quarterly instalments on the 25th June, etc. The quarterly payment of the 25th June had not accrued, and that cannot be recovered. One quarter's rent has been paid. Therefore, on the claim, I will give judgment for the plaintiff for £750, being the amount of the quarterly payments due and unpaid ; and the plaintiff is entitled to the costs of the claim.

Then, the defendant has counter-claimed. The counter-claim is :—"(1) By an agreement dated on or about the 1st March, 1889, the plaintiffs agreed with the defendant to under-let to him the premises as from the 15th March, 1889, at a rental of £1,000 per annum ; (2) The defendant repeats paragraphs 4, 5 and 6 of the de-

fence. The defendant claims specific performance of the agreement, or £2,000 damages." That means, either specific performance or damages. The whole of the evidence has been directed to damages, because the defendant did not get his lease as soon as he ought to. But it appears that, after action brought, this lease was perfected and registered. Therefore, as to the counter-claim, it is one of those cases in which all that the defendant has claimed has been done before judgment. The defendant is entitled to his costs of the counter-claim, but there is no room for damages. If the plaintiffs had tendered costs up to the date that the lease was registered, he would have been entitled to his subsequent costs.

From this decision the defendant appealed to the Full Court [Coram Higinbotham, Q.C., a'Beckett and Hood, JJ.].

Higgins for the appellant :—The defendant was always perfectly willing to pay rent for the premises, if he were allowed a reasonable sum for not getting the sub-lease registered in time, because, owing to the plaintiffs' inability [*708] to get their landlord's consent in writing, the defendant was unable to sub-let a portion of the premises which, as the plaintiffs were aware, he always intended to do.

[Hood, J.—Is it claimed in the pleadings?]

It is submitted that it is claimed in the alternative claim for damages in the counter-claim. The person making alternative claims is entitled to rely on either one or the other, and the defendant here elected to rely on the claim for damages. Both parties gave evidence as to the damage suffered by the defendant through being unable to sub-let a portion of his premises. The plaintiffs are entitled to succeed in this action, because, at the time the writ in the action was issued, the sub-lease was not registered. If the amended reply is admissible as a pleading at all, it is only a reply to the counter-

claim, and does not make their position at the trial of the action any better, for the question is, what, at the time of the issue of the writ, was the position between the parties ?

[Higinbotham, C.J.—At the time the writ was issued there was a lease executed by the parties containing a covenant to pay rent. What was there to prevent the plaintiffs suing on the covenant ?]

It is not a deed, and is not to be deemed as of the same efficacy as if under seal until it is registered. There is therefore no covenant until it is registered. Under the old law a lease for more than three years is of no avail unless it is under seal. Under the "Transfer of Land Statute" it is of no avail until it is registered: Secs. 63, 92 and 99 of the "Transfer of Land Act, 1890" (No. 1149). The case of Trewhella v. Willison,[1] to which reference will probably be made, does not affect the matter. All that was held in that case was that the Legislature, by the "Transfer of Land Statute," had provided that a deed not duly acknowledged by a married woman should not have effect as a conveyance—but that it was not provided by the Act that it should not have effect as a deed, and therefore the married woman could be sued on the covenant therein contained. Here there was no deed. As to the claim for use and occupation, the defendant entered into possession of the premises by the permission of the plaintiffs on an agreement for a lease, and the plaintiffs [*709] cannot sue for use and occupation on an agreement for a lease. Their remedy is to compel their landlord to give his consent, issue, and have registered a sub-lease as from the original date, and then sue the defendant for the rent if he does not pay. Where the occupation is referable to a particular agreement the inference necessary for a claim for use and occupation that the occupant promised to pay a fair rent cannot be drawn. In any case the defendant only used, and only intended to use a portion of the premises, and on the claim for use and

[1] 14 V. L. R. (L.) 122.

occupation the plaintiffs should only recover as for that portion. The Court has ample power to grant such further or other relief as, upon the facts given in evidence, it may think fit, or to mould the prayer of the counter-claim accordingly. It is submitted that it would be equitable to grant the relief asked by the plaintiffs only on their paying the defendant damages for his inability to let the portion of the premises which he did not use. It was never contended at the trial that the defendant was not entitled to some damages for the delay; the only contention was as to the amount.

[Higinbotham, C.J.—Assuming that you have sustained some damage, we have no evidence from which we can estimate the amount.]

The rent is shown, and the proportion of the premises occupied by the defendant shown.

[Hood, J.—You assume that a person would give one-half the rent for one-half the premises.]

As to the claim for use and occupation :—

[Topp—Sec. 22 of the Landlord and Tenant Act, 1890 (No. 1108)].

The second part of the section is an addition to the first, and provides merely that if there be an informal deal or an agreement, not by deed, it may be used as evidence of the quantum of damages to be recovered for use and occupation. Where, however, there is produced at the trial a deed or registered instrument, which shows a lease of the premises covering the same term, and between the same parties, there can be no remedy for use and occupation, for it is merged in the deed or registered instrument.

[*710] Fink and Topp, for the plaintiffs, respondents:—The evidence shows that the defendant went into possession not under the deed, but under a letter put in evidence, which amounted to an agreement for a lease. Besides, the lease itself, until registered, amounts only to an agreement for a lease. (They were stopped by the Court.)

Higinbotham, C.J., delivered the judgment of the Court [Higinbotham, C.J., a'Beckett and Hood, JJ.].—We think that this appeal has not been sustained, and that it must be dismissed with costs. The plaintiff is entitled to hold the judgment on his statement of claim in respect of use and occupation. There is clear evidence that the defendant entered and used these premises for a long period before the lease was executed, and also before the lease was completed and registered under the "Transfer of Land Act." The lease was executed by the parties before the action. It was completed and registered after action and before trial. The only difficulty that presents itself in the plaintiff's way arises from the terms of the 22nd section of the Landlord and Tenant Statute, by which it is provided that if at the trial of an action for use and occupation a parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff shall not be nonsuited, but may make use thereof as evidence of the quantum of damages to be recovered. From that, and the earlier terms of the same section, it was contended that, inasmuch as this deed was perfected before it was produced at the trial, use and occupation will not lie. The answer to that appears to us to be that the claim for use and occupation which arose under the original agreement between the parties on the 1st March, 1889, was not merged in the sublease at the commencement of the action, and if it was merged afterwards, merger was not pleaded. The plaintiff then will be entitled on the statement of claim, in accordance with the verdict of the learned Judge, to retain his verdict.

The form of the defendant's counter-claim is for specific performance of agreement or damages. Before the trial specific performance was given, and, accordingly as he has so shaped his counter-claim, the defendant is not entitled to both specific performance and damages. [*711] We think that the learned Judge's ruling on this part of the case was correct, and that the defendant having obtained what he asked for, namely, specific per-

formance, was not in a position, without amendment of his counter-claim, to proceed for damages—and that appears to have been his own impression, for the evidence that was adduced as to damages was so insufficient to enable the Judge to assess the amount of damages to which the defendant was entitled that it was impossible to grant his claim for damages, even if he were in a position to assert his right thereto. The learned Judge did not express any doubt that the defendant might have been entitled to damages for the delay in granting the sub-lease, and we must not be understood to question the defendant's right in another proceeding to establish and assess his right to such damages. The judgment on this part of the case will be affirmed, but we shall be willing to make an addition to the judgment, if Mr. Higgins should so desire, for the purpose of placing it beyond dispute on the record that the learned primary Judge's judgment was not intended to prevent the defendant from claiming damages for the delay in getting the landlord's consent. The confirmation of this judgment is not intended to affect the defendant's right.

[Higgins :—That would answer.]

Appeal dismissed with costs. Judgment affirmed. The addition to be made to the judgment that it is without prejudice to the defendant's rights (if any) to damages for the delay by the plaintiffs in performing their agreement.

Solicitors for plaintiffs :—Fink, Best and P. D. Phillips.

Solicitors for defendant :—Blake & Riggall.

VICTORIA, 1883, SUPREME COURT.] [9 V. L. R. (L.) 417.

IN RE THE "TRANSFER OF LAND STATUTE," EX PARTE RIGBY.

"Transfer of Land Statute" (No. 301), sec. 132—Delivery of certificate for cancellation—Issue of certificate on incorrect representation.

Where an applicant, to bring land under the "Transfer of Land Statute," obtained a certificate of title by incorrectly representing that a person in possession was only a trespasser, the Court ordered that such certificate should be delivered up to be cancelled, it being shown that the certificate holder had failed in an action of ejectment against the person in possession by reason of his setting up a right by possession for the statutory period of limitation.

Summons referred to the Court by Williams, J., calling upon the Colonial Bank of Australasia to show cause why a certificate of title issued to and in the name of the bank should not be delivered up to the Registrar of Titles, for the purpose of being cancelled, on the ground that the certificate was issued to the bank in error; that the certificate was wrongfully obtained by the bank; and that it was wrongfully retained by the bank.

The affidavits in support of the summons stated that an action had been brought by the bank to eject the applicant from the land in question, in which the jury found for the defendant; that, about June, 1882, one Hughes, on behalf of the bank, requested the applicant to pay rent to the bank for such land, but the applicant claimed the land as his own; that, in August, 1882, Hughes attempted to drive the applicant's cattle off the land, for the purpose of taking possession of the land, but the applicant stopped him; that on 3rd October, 1882, one Boully, an inspector of the bank, applied, on behalf the bank, to have the land brought under the "Transfer of Land Statute," and to have the bank registered as proprietor, in which application he declared that the bank was owner of an estate in the land as trustee for sale of the fee simple, under an indenture of 22nd June, 1869, between one Glass and the bank, that

he was not aware of any mortgage or encumbrance affecting the land, or that any other person had any estate or interest therein at law or in equity, in possession, remainder, reversion or expectancy, and that the land was unoccupied by any person authorised by the bank; [*418] that J. E. Rigby (the present applicant) was then using the land for grazing his cattle, but was a trespasser; that in June, 1882, the rate collector applied to Boully for the rates due on the land, but Boully refused to pay, saying "Rigby has been there long enough; he is the person to pay," and wrote Rigby's name on the rate slip; that, at the trial of the action of ejectment, Rigby relied solely on his continuous possession of the land for more than fifteen years; that the applicant's attorney was authorised by the Registrar of Titles to apply for this summons.

The registrar made an affidavit (inter alia) that it had been shown that, at the time of Boully's application to bring the land under the Act, the bank, by some of its officers, knew that the land was claimed by Rigby; that he issued the certificate of title in the name of the bank in consequence of the statement that Rigby was only a trespasser; that it had since appeared, to the registrar's satisfaction, that the certificate had been wrongfully obtained, and was wrongfully retained by the bank, and the registrar, on 9th April, 1883, required the bank to hand in the certificate for cancellation; that the registrar again, on 27th June, required the bank to give up the certificate; that, if Rigby had applied to bring the land under the Act at or before the time when Boully applied, and had proved, as he did in the action of ejectment, that he had held the land for more than 15 years, and had acquired a right to the possession of it, a certificate of title would have been issued to Rigby.

Answering affidavits stated that when Hughes requested the applicant to pay rent to the bank his answer was that he did not think the land was of much use, but he would think the matter over, and let him know in a few days; that subsequently, on 4th August, the applicant told Hughes he would not rent the land

from the bank, as he did not recognise its claim to the land, but he did not, on either occasion, claim the land as his own ; that Boully had not had an interview with the rate collector in June, 1882, nor before 4th August, 1882, but that he then told him that the bank objected to pay the rate, as the land was occupied by Rigby, who claimed it as a gift from Glass ; that Boully had been informed by Rigby's father, in the beginning of August, that Rigby claimed the land as such gift ; that, at the time of [*419] applying on 3rd October, 1882, to bring the land under the Act, Boully understood that Rigby claimed by virtue of such gift ; that in the action of ejectment, Rigby claimed by virtue of such gift, as well as by 15 years' possession ; that on 21st February, 1883, Rigby lodged a caveat against the application of the bank, claiming an estate in fee simple, but caveat was allowed to lapse ; that, on 19th August, 1883, the bank issued a second writ in ejectment against Rigby in respect of this land, which was still pending.

An affidavit in reply stated that Rigby's father had, in the beginning of August, 1882, told Boully that Rigby had been in possession for nineteen years, as well as that he claimed it under a gift from Glass.

Dr. Madden in support of the summons :—This summons issued under the "Transfer of Land Statute" (No. 301), Sec. 132. The answering affidavits set out the same matters upon which the jury, at the first trial, found for the applicant. The meaning to be put upon Sec. 132 now comes in question ; if it applies to a case like this, the registrar is satisfied that the certificate of title issued and is retained wrongfully. That section is intended to cover any erroneous issue or retention of a certificate of title ; it is a comprehensive drag-net. Its object is to keep the register absolutely correct. Sec. 144 applies where a proprietor has, by some error, been deprived altogether of his interest in land, and gives him a remedy against the person whose act occasioned the loss ; Sec. 146 gives the proprietor a remedy against the assurance fund where there has been a misdescription by the officers of the department, where the estate

has not been taken out of him. The intention is that there should be a double remedy by which the proprietor should be protected, and the register should be rectified. In this respect, the decision in Ex parte Patterson [1] of this Court was not disturbed on appeal to the Privy Council.[2] When Boully obtained the issue of a certificate of title to the bank, he was aware of facts which he did not disclose to the registrar, and which made the obtaining of that certificate wrongful. That gives the registrar a right to call in the [*420] certificate. The applicant is wronged, though he was successful in the first ejectment, because a second action has been brought against him ; and he may be harassed by many others if this certificate is left in the hands of the bank.

Hodges contra :—The applicant has to satisfy the Court, as well as the registrar, that this certificate has been wrongfully issued. The registrar could not have declined to issue the certificate, as the applicant had allowed his caveat to lapse, without taking any proceedings to sustain it ; so that the registrar has no right to say that he would not have issued this certificate if he had known the facts now stated. As to the alleged wrongful obtaining of the certificate, the only statement challenged was that the land was not occupied by any person authorised by the bank, but that Rigby was using the land as a trespasser. Secs. 21-3 deprive a caveator who has allowed his caveat to lapse of any right to consideration. Certainly no fraud is suggested which had any effect on issue of the certificate. The Court will not, therefore, encourage the applicant to ask for a recall of the certificate.

Dr. Madden in reply :—The lapse of the caveat does not settle the matter. It was impossible for the applicant to follow up his caveat by any proceeding at law or in equity, as he was in possession. The registrar now makes affidavit that he would not have issued this certificate if he had known all the facts. The Act does not

[1] 4 A. J. R. 26.

[2] 2 App. Cas. 110; 46 L. J. (P. C.) 21.

require the registrar to issue a certificate immediately upon the lapse of a caveat; he may investigate the title of a caveator who could not follow up his caveat. Such an investigation would show that the applicant has a good title by adverse possession. [Higinbotham, J.—How could a title by adverse possession prevent the issue of a certificate of title? All certificates are subject to such titles.] The policy of the Act is that a person applying to bring the land under it, or to be registered as proprietor, shall succeed by the strength of his own title. "Wrongfully" covers all the ground not covered by "fraudulently."

Cur. adv. vult.

[*421] The judgment of the Court[3] was delivered by Holroyd, J.—Summons referred to the Court. The summons was issued under the 132nd section of the "Transfer of Land Statute," at the instance of the Registrar of Titles, calling on the Colonial Bank to show cause why a certificate of title which the bank had obtained should not be delivered up to be cancelled. We think the summons should be granted. The certificate was issued on the supposition that Rigby, who set up a statutory title to the land by length of possession, was only a trespasser, as declared by the bank's attorney in his application. Rigby's claim was afterwards established in an action of ejectment brought by the bank, and the certificate was therefore issued in error.

Order accordingly.

Attorneys for the applicant:—Madden & Butler.

Attorneys for the respondent:—Moule & Seddon.

[3] Stawell, C.J., Higinbotham and Holroyd, JJ.

SUPREME COURT, VICTORIA, 1892.] [18 V. L. R. 727.

TAYLOR v. WOLFE & COMPANY.

"Transfer of Land Act, 1890" (No. 1149), secs. 124, 125, 131—Discharge of mortgage, registration of—Consent of mortgagee to sue.

A mortgagor of land under the "Transfer of Land Act, 1890" (No. 1149), who has paid off the money due under the mortgage, and who has lodged the discharge for registration, but has not obtained registration thereof, is bound by Sec. 125 of the Act No. 1149 to obtain the written consent of the mortgagee before he can commence an action in his own name in respect of which the mortgagee might have sued.

Special case reserved for the opinion of the Full Court by the Judge of the County Court of Melbourne.

The action was brought by the plaintiff for the sum of £13 12s. 6d. for the use and occupation of certain premises. The defendants, by their defence, raised the objection that the plaintiff had not obtained the written consent of the mortgagee to bring this action. The following evidence was given :—The certificate of title, mortgage by plaintiff, discharge of mortgage, and some other documentary evidence not material to this report were put in. It was admitted that the defendants were in possession of the premises, and had previously paid rent, but not for the period of time now sued for. The discharge of the mortgage had been lodged for registration, but had not been registered before the commencement of this action, and it is admitted that the plaintiff had not obtained the consent in writing of the mortgagee before commencing the action. The case was tried in the County Court at Melbourne, before His [*728] Honor Judge Casey, who reserved the following question for the opinion of the Full Court :—"The mortgagee having been paid off and the discharge of the mortgage having been lodged for registration, but not registered before the commencement of this action, was the plaintiff under the circumstances hereinbefore set out, and having regard to Secs. 124 and 125 of the 'Transfer of Land Act, 1890,' entitled to commence this

action in her own name without the previous consent in writing of the mortgagee ?"

Pigott for the plaintiff :—As soon as the mortgage was paid off the mortgagee had no rights thereunder. Sec. 124 of the "Transfer of Land Act, 1890," was intended to protect the mortgagee, and a stranger could have no greater rights than the mortgagee.[1] No doubt under Sec. 125 a mortgagor cannot sue without the written consent of the mortgagee. There must, however, be an actual mortgage in existence, and if the moneys have been paid off, the relation of mortgagor and mortgagee ceases, and Sec. 125 would not apply to such a case. Under the provisions of Sec. 131 the mortagage must be taken to have been discharged.

Fink, for the defendant, was not called upon.

Higinbotham, C.J., delivered the judgment of the Court [Higinbotham, C.J.,Williams and Hodges, JJ.]—The answer [*729] to the question presented to us on this special case must be determined by the terms of Sec. 124 of the "Transfer of Land Act, 1890." (His Honor read the section). Those provisions show that the registration of the discharge is essential to the validity and effect of the discharge. This discharge was not

[1] "Sec. 124—In addition to and concurrently with the rights and powers conferred on a first mortgagee and on a transferee of a first mortgage by this Act, every present and future first mortgagee for the time being of land under this Act, and every transferee of a first mortgage for the time being upon any such land shall, until a discharge from the whole of the money secured, or until a transfer upon a sale or an order for foreclosure (as the case may be) shall have been registered, have the same rights and remedies at law and in equity (including proceedings before justices of the peace) as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him with a right in the mortgagor of quiet enjoyment of the mortgaged land until default in payment of the principal and interest money secured, or some part thereof, respectively, or until a breach in the performance or observance of some covenant expressed in the mortgage or to be implied therein by the provisions of this Act. Nothing contained in this section shall affect or prejudice the rights or liabilities of any such mortgagee or transferee after an order for foreclosure shall have been entered in the register book; or shall, until the entry of such an order, render a first mortgage of land leased under this Act or the transferee of his mortgage liable to or for the payment of the rent reserved by the lease, or the performance or observance of the covenants expressed or to be implied therein."

lodged for registration until the 17th March, 1892, and was not registered at the time when this action was commenced. We are of the opinion that the mortgagor had not a right to commence this action in her own name without the previous consent in writing of the mortgagee.

Question answered in the negative.[2]

Solicitor for plaintiff:—Hopkins.

Solicitor for defendant:—Peers.

SUPREME COURT, VICTORIA, 1889.] [15 V. L. R. 329.

SANDHURST MUTUAL PERMANENT INVESTMENT BUILDING SOCIETY v. GISSING.

"Transfer of Land Statute" (No. 301), sec. 49—Meaning of the words "tenant," "interest of any tenant," in sec. 49.

The word "tenant" in the Transfer of Land Statute, Sec. 49, must be deemed to include every tenant who is in actual occupation, and holds under some landlord.

The words "interest of any tenant," in the same section, imply that every interest in the land of such a tenant, which grows out of, and is not disseveral from his right to continue in occupation as a tenant, is protected by the terms of this section against the claim of a proprietor under a certificate of title.

The defendant was let into or allowed to remain in possession of land under a contract for the sale of the land to him by the vendor. The vendor at the same time transferred the land to the plaintiff society.

Held, in an action of ejectment the defendant being in possession of the land as tenant, that this, together with the contract of sale, constituted an interest to which the land was subject under Sec. 49 of the "Transfer of Land Statute," and that this claim must prevail against the claim of a proprietor transferee of the certificate of title of the land, and that such transferee could not succeed in an action of ejectment.

It is not to be recognized as a principle of law that mere negligence can deprive a tenant of his statutory rights under Sec. 49 of the "Transfer of Land Statute."

Appeal from the County Court at Sandhurst against a judgment in favour of the defendant in an action of ejectment.

The material facts appear in the judgment.

[2] But see Louch v. Ball, 5 V. L. R. (L.) 157.

Higgins, for plaintiffs appellants, cited Le Neve v. Le Neve ;[1] (Winterbottom v. Ingham[2] was referred to by Higinbotham, C.J.); Calvert v. Tate ;[3] Robertson v. Keith ;[4] Cunningham v. Gundry ;[5] Munro v. Sutherland ;[6] Ettershank v. Leal.[7]

Topp and Quick, for defendant respondent, cited Colonial Bank of Australasia v. Rabbage;[8] Colonial Bank v. Roache ;[9] Mayor, etc., of Staple of England v. Governor, etc., of Bank of England.[10]

Cur. adv. vult.

[*330] The judgment of the Court [Higinbotham, C. J., Holroyd and Kerferd, JJ.], was delivered by Higinbotham, C.J.—Appeal from the judgment of the Judge of the County Court at Sandhurst in an action of ejectment. On 19th October, 1885, the plaintiff society advanced a sum of £150 to one Esler, taking from him as a security for repayment a transfer of the land in question, and giving him a deed of defeasance. On 27th October, 1885, a certificate of title was issued to the plaintiff society. The defendant then was, and had been from a date prior to January, 1882, in possession of the land. The land was Crown land when the defendant first entered on it. Esler subsequently obtained the Crown grant, and the defendant became his tenant. On 5th January, 1882, the defendant agreed to buy the land from Esler for £70. He afterwards paid the purchase money in full, and obtained the Crown grant from Esler on the 18th January, 1884. Litigation, not resulting in a change of the relation between the vendor and the purchaser as to this land, followed between the parties,

[1] 2 Wh. & Tud., L.C. (6th ed.), at page 63.
[2] 7 Q. B. 611.
[3] Argus Rep., 8th Aug., 1867.
[4] 1 V. R. (Eq.) 11; Molesworth, J., at page 14.
[5] 2 V. L. R. (Eq.) 197.
[6] 5 A. J. R. 38, 75, 139.
[7] 8 V. L. R. (Eq.) 333.
[8] 5 V. L. R. (L.) 462.
[9] 1 V. R. (L.) 165.
[10] 21 Q. B. D. 160.

the defendant remaining in possession of the land, and claiming a return of the Crown grant which he had given back to Esler in the course of their disputes, and specific performance of the contract of sale. Esler died on 22nd April, 1887. The question we have to determine turns upon the meaning of the words in the 49th section of the "Transfer of Land Statute": "The land which shall be included in any certificate of title shall be deemed to be subject . . . where the possession is not adverse to the interest of any tenant of the land notwithstanding the same may not be specially notified as an incumbrance on such certificate." It has been contended for the plaintiff company that the word "tenant" here means a lessee, that the object of this provision was to protect the interest of a person whose lease could not be registered under the statute as being for a term not exceeding three years (see Sec. 75), and that such interest only of a tenant is protected as belongs to him in his capacity of lessee. An early decision, that of Calvert v. Tarte,[11] followed by Munro v. Sutherland,[12] favours this limited construction. It is unnecessary for the purpose of deciding this case that we should either adopt or reject the suggestion made in the course of the argument, namely, that the word "tenant" in this place ought [*331] to be construed in the wide sense of any person who is the holder in actual possession, not adverse, of land brought under the operation of the Act, and that the "interest" of such a person includes all rights in respect of the land either springing out of or accompanying such actual possession. But we think that the word "tenant" must be deemed to include at least every tenant who is in actual occupation, and holds under some landlord, and that every interest in the land of such a tenant which grows out of, and is not disseverable from, his right to continue in occupation as a tenant is protected by the terms of this provision against the claim of a proprietor under a certificate of title.

[11] Argus Rep., 8th Aug., 1867.

[12] 5 A. J. R., p. 139.

The more recent decisions of this Court justify to this extent, at all events, a larger construction being placed upon these words than was allowed by the earlier cases. See Robertson v. Keith,[13] Cunningham v. Gundry,[14] in which the same learned Judge stated that he had reconsidered, and that he retained the opinion he had expressed in the previous case: Colonial Bank v. Rabbage.[15] Applying this meaning of the terms of the section, what was the "interest" of the defendant in this land on 19th October, 1885, when Esler, his vendor, transferred the land to the plaintiff society? Having been let into or allowed to remain in possession under a contract for the sale of the land to him, the defendant became at law tenant at will to his vendor, and he could not be ejected by his landlord without a previous demand of possession. He had at the same time an equity which would not allow his vendor to determine the tenancy at will except by converting it into an estate in fee simple. It is impossible in such a case to dissever the tenancy and the contract from one another. They together constitute, we think, an interest to which the land was subject, and which is entitled to prevail against the claim of the new proprietor under his certificate of title.

It was further argued for the plaintiffs that there had been such negligence or laches on the part of the defendant as should deprive him of his right under the statute. The learned Judge who tried the case must be taken to have found that there was no such negligence or laches, and we concur in that opinion, particularly as [*332] the plaintiff society laid itself open by its conduct to the same charge. At the same time we must not be understood in expressing this opinion to recognise it to be a principle of law that mere negligence could deprive a tenant of his statutory rights under Sec.

[13] 1 V. R. (Eq.) 11; Molesworth, J., at p. 14.
[14] 2 V. L. R. (Eq.) 197.
[15] 5 V. L. R. (L.) 462.

49 of the "Transfer of Land Statute." The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs:—Crabbe, Cohen & Kirby.

Solicitors for defendant:—Connelly & Tatchell.

SUPREME COURT, VICTORIA, 1886.] [12 V. L. R. 566.

IN THE MATTER OF THE "TRANSFER OF LAND STATUTE," EX PARTE VINCENT.

"Transfer of Land Statute, sec. 117—Summons to remove caveat.

On application under Sec. 117 of the "Transfer of Land Statute," by the registered proprietor of land, to have a caveat removed, the Court will not order such caveat to be removed upon such application where there is a conflict of testimony, but may order that such caveat shall be removed unless steps are taken to establish caveator's title within a certain time.

Summons under the "Transfer of Land Statute" (No. 301) to show cause why a caveat should not be removed from the Register of Titles.

Forlonge, for the caveator:—This is an application to the Court to have a caveat removed; but it is submitted that Sec. 117 does not authorise the Court, upon a summons, to deal with the merits of a case involving a conflict of testimony. It is merely a cheap way to get rid of the caveat. The proprietor has not dealt with the land.

Neighbour, for the registered proprietor:—Sec. 117 does not require that there should be any dealing with the land; it merely [*567] directs a summons to be taken out; upon the hearing of that summons the Court may make out such order as it thinks fit. [Holroyd, J.—Can we in a summary way direct that the caveat be removed where there is a conflict of testimony between the parties? There ought not to be any doubt as to your right or title before such an order is made. Where you have actually dealt with the land it is different, for there the caveator must prove his case. If you were to apply

for the issue of a registration abstract, that would force the caveator to prove his title within fourteen days, or have the caveat struck out.] The Court may make any order it thinks fit, and may direct that the caveator should proceed to establish his title within a certain time.

Forlonge :—I have no objection to such an order being made.

Per Curiam.[1] It is ordered that, unless proceedings are commenced within a certain time by the caveator to enforce his claim, the caveat shall be removed.

Solicitor for the registered proprietor:—Pyman.

Solicitor for caveator:—Kidston.

VICTORIA, 1891.—WEBB, J.] [17 V. L. R. 203.

RICHARDS v. CADMAN.

"Transfer of Land Act, 1890" (No. 1149), secs. 19, 55 and 139—Judgment debtor—Fi. fa.—Lodgement for registration—Estate or interest of debtor not appearing in register book—Retention of fi. fa. in Titles Office—Mortgage—Lease from Crown—"Register book"—Priority of registration.

A copy fi. fa. and statement specifying the land, lease, mortgage, or charge sought to be affected thereby, presented for registration under s. 139 of the "Transfer of Land Act, 1890" (No. 1149), cannot be registered by the Titles Office unless the estate or interest of the judgment debtor, against which it is sought to be registered, appears upon the Register Book at the time the copy fi. fa. is lodged. It was not intended by that section that such copy fi. fa. and statement should be retained in the office until such estate or interest should appear in the Register Book.

Prior to April, 1890, C. was the licensee from the Crown of certain land, and in that month a judgment was obtained against him by R., and a writ of fi. fa. was issued thereon on the 18th August, 1890. On the 22nd August, 1890, C. applied for a lease from the Crown of the land of which he was the licensee. The application was subsequently approved, and on the 28th October, 1890, the lease was executed by the Governor in Council, and on the 2nd December, 1890, by C. The lease was for fourteen years from the 1st March, 1890, and was dated as of that date. On the 11th March, 1890, C. had executed a memorandum of mortgage over the land, purporting to be under the provisions of the "Transfer of Land Statute" (No. 301) in favor of D. On the 11th December, 1890, at 1.37 a.m., a copy of the writ of fi. fa., together with a statement specifying the land sought to be affected, was lodged in the Office of Titles for

[1] Stawell, C.J., Holroyd and Kerferd, JJ.

registration, and remained there during that day. On the same day, at 12.30 p.m., the lease was lodged for registration and entered in the Register Book. On the same day, at 1.47 p.m., the mortgage was lodged for registration.

Held, that the mortgage was entitled to be first registered, inasmuch as it was the first document lodged for registration after the entry of the lease in the Registry Book.

Action for an injunction to restrain the Registrar of Titles from registering, and the other defendants from proceeding to register, a mortgage as an incumbrance to a certain Crown lease of land, except subject to a writ of fi. fa.; for a declaration that the fi. fa. was entitled to priority over the mortgage, and an order that the registrar register it in priority thereto.

The action was brought by Catherine Richards against Walter Cadman, Elspeth Affleck Downie, and H. C. A. Harrison, Registrar of Titles, and the statement of claim alleged :—

1. Prior to and during the early part of the year 1890, the defendant, Walter Cadman, was the licensee from the Crown of certain land in the parish of Tatonga.

2. In April, 1890, an action was tried in the Supreme Court, in which the plaintiff was plaintiff and the defendant, Walter Cadman, was defendant, by Hood, J., and on the 17th April, 1890, [*204] judgment was directed to be entered for the plaintiff for £115 17s. 9d., with costs to be taxed ; execution to be stayed for three months from that date.

3. The judgment was duly entered on the 9th May, 1890, for £278 16s. 6d., the amount recovered and taxed costs.

4. A writ of fi. fa. was issued on the judgment on 18th August, 1890, and was on the same day lodged with the sheriff of the northern bailiwick for execution, but the writ was never satisfied in whole or in part.

5. On the 22nd August, 1890, the defendant, Walter Cadman, applied for a lease from the Crown of the said land, of which he was the licensee as aforesaid, and the said application having been approved on the 28th October, 1890, the lease was executed by the Governor,

and on the 2nd December, 1890, the lease was executed by the defendant, Walter Cadman, as lessee.

6. The lease, though executed on that day, was dated 1st March, 1890, and was for the term of fourteen years from that date, and the land comprised in the said lease had not been previously alienated from the Crown.

7. Previously to the execution of the lease by the Governor or the said Walter Cadman, namely, on 11th March, 1890, Walter Cadman had executed a memorandum of mortgage over the land purporting to be under the provisions of the "Transfer of Land Statute" (No. 301), to the defendant, Elspeth Affleck Downie (the date appearing on the mortgage being the 11th March, 1890), and the defendants, Walter Cadman and Elspeth Affleck Downie, at the time of executing the mortgage well knew that the plaintiff herein had commenced the said action against the defendant, Walter Cadman.

8. On the 11th December, 1890, a copy of the said writ of fi. fa., together with a statement under Sec. 139 of the "Transfer of Land Act, 1890," specifying the said land and the said leasehold estate therein as the land and estate sought to be affected by the said writ, was lodged at the Office of Titles for registration at 11.37 a.m., and remained in the said office during that day.

9. On the 11th December, 1890, at 12.30 p.m., the lease was lodged for registration, and was entered in the Register Book, Vol. 608, Fol. 121517, and on the same day, at 1.47 p.m., the mortgage was lodged for registration by the defendant, Elspeth Affleck Downie, through her solicitor, John Wilkinson, the said solicitor and Elspeth Affleck Downie well knowing that the plaintiff had obtained the judgment and issued the writ of fi. fa. thereon.

10. The defendant, H. C. A. Harrison, is sued as Registrar of Titles, and as such registrar will, if not restrained by this Honourable Court, proceed to register the mortgage as an incumbrance on the lease in priority, and not subject to the said writ of fi. fa.

11. The plaintiff will contend that by virtue of the provisions of Sec. 19 of the "Transfer of Land Statute, 1890," she is entitled to have the said writ of fi. fa. registered as an incumbrance on the lease in priority to the mortgage.

The Registrar of Titles did not enter an appearance. The defendants, Cadman and Downie, jointly defended and admitted paragraphs 1, 2, 3, 4, 5 and 6 of the statement of claim. They denied that Downie knew of the action being commenced, or that the plaintiff had obtained judgment and issued the writ of fi. fa., though they admitted that Cadman did know. They would contend that at the time [*205] the copy writ fi. fa. was lodged there was no estate registered in the Titles Office against which it could be registered.

Cussen for the plaintiff.

[Webb, J.—Do you rely on the allegations of notice?]

No; I do not think I can.

[Webb, J.—I do not see how it could affect the case.]

No; I rely on Sec. 19 of the "Transfer of Land Act, 1890" (No. 1149), which provides that registration of grants in fee or for years from the Crown shall be deemed and taken to be an enrolment of record of the grant, and such enrolment shall relate back to the day of the date of the grant. So that it must be deemed that there was, at the time of the lodgement of the fi. fa. something against which the fi. fa. could be registered. And it is only by virtue of such relation back that Cadman could execute a mortgage to Downie, or describe himself therein as the "registered proprietor."

[Webb, J.—If we are to be very technical, I do not see how this Sec. 19 would apply at all. It relates only to grants of land remaining unalienated at the time of the commencement of the Act. In this case, if the enrolment related back to the date of the grant, it did not remain unalienated at the time of the passing of this Act.]

That is the effect of the consolidation of the Act. It means, and according to the Interpretation Act must

be taken to mean, the commencement of the Act No. 301, from which this Act is taken ; or, at all events, Act No. 301 must be taken as still existent. Besides, Sec. 17 of the "Land Act, 1890" (No. 1106), would provide for this case. The difficulty about there being nothing against which to register a fi. fa. was dealt with by your Honor in Sander v. Twigg,[1] where your Honor held that a liberal construction ought to be given to Sec. 106 of the Act No. 301 (Sec. 139 of the present Act). In that case the interest against which it was said that the fi. fa. should have been registered was incapable of being registered, and your Honor still thought that the fi. fa. should have been received. Some doubt was expressed by Higinbotham, C.J., [*206] and Holroyd, J., as to that, and your Honor again considered and decided the point in Watson v. Royal Permanent Building Society,[2] but that case differed from the present in this respect, that there the fi. fa. was not in the office—it had been returned because there was nothing to register it against. In this case the fi. fa. was still in the office when the lease was registered. In that case, too, the difficulty arose from adopting a form of security not recognised by the Act. In this case the Act makes the registration of the lease compulsory.

[Webb, J.—How is the registrar to keep in his mind everything lodged, for it may be six months before? The register itself is merely a bundle of grants or certificates.]

It is submitted that the register shall not consist merely of a number of grants bound up, as provided by Sec. 55 of the "Transfer of Land Act, 1890." Any practical difficulty as to registering a fi. fa. against a leasehold interest could be got over by registering against the name of the lessee, which, of course, is the name in which the lease will eventually be issued, and when the lease comes into the office the registrar will at once see

[1] 13 V. L. R. 765.

[2] 4 V. L. R. 283.

that there is a fi. fa. against it. The lease, and the registration of the lease, in the eye of the law, are dated the 1st March, 1890, and the fi. fa. issued after that date ought to affect them.

Box (with him Wiegall) for the defendants Cadman and Downie :—Handing the fi. fa. over the counter at the Titles Office is not a lodgement ; it is not lodged until it is accepted or refused, and then dates back to the time of handing it over the counter.

[Webb, J.—The defence uses the term "lodged" in the same sense as the plaintiff uses it, not in the sense in which you contend it should be used.]

It is submitted that the first document presented after the lease is registered is entitled to registration in priority to all others. Before the lease is registered there is nothing in the office against which to register a fi. fa., and therefore it cannot be registered: Sander v. Twigg ;[3] Watson v. Royal Permanent Building Society.[4]

Cussen in reply.

[*207] Webb, J.—As I have had occasion to consider this question very fully on previous occasions, I do not think it necessary to reserve my decision. The question which arises in this case is which of two instruments was entitled first to registration. The facts are shortly these: The plaintiff obtained judgment against the defendant Cadman and issued a fi. fa. on that judgment. A copy of that fi. fa., accompanied by a statement of a certain leasehold interest in Cadman, was presented for registration at the Titles Office on the 11th December, 1890, at the hour of 11.37 a.m. The defendant Cadman was lessee under a lease which had then been signed by the parties, but not registered. At 12.30 p.m. on the same day that lease was presented for registration and registered, and was entered in the Register Book, Vol. 608, Fol. 121517. At 1.47 p.m. on the same day a memorandum of mortgage, by the defendant Cadman as

[3] 13 V. L. R. 787.
[4] 14 V. L. R. 283.

lessee to the present defendant Downie, was presented for registration. Therefore, the order of events was copy fi. fa. and statement presented for registration, lease presented for registration and registered, memorandum of mortgage presented for registration, and the question which arises is whether the copy fi. fa. and statement was entitled to be registered in priority to the memorandum of mortgage. That copy fi. fa. and statement was lodged under Sec. 139 of the "Transfer of Land Act." That section is: "No execution registered" (that does not refer to registration under this Act) "prior to or after the commencement of this Act shall bind, charge or affect any land or any lease, mortgage, or charge; but the registrar on being served with a copy of any writ of fieri facias issued out of the Supreme Court, or of any decree or order of such Court, accompanied by a statement signed by any party interested, or his attorney, solicitor, or agent, specifying the land, lease, mortgage, or charge sought to be affected thereby, shall, after marking on such copy the time of such service, enter the same in the Register Book." It contemplates that the registrar is to enter the copy fi. fa. in the Register Book as soon as it is served upon him. Now, Sec. 50 tells us what the "Register Book" is. It says: "Certificates of title shall be in duplicate in the form in the Third Schedule hereto; and the registrar shall keep a book to be called the 'Register Book,' and shall register or enter by binding up therein one of the grants and one of the certificates of title, [*208] and shall deliver the other original (hereinafter called the duplicate) to the proprietor. Each grant and certificate shall constitute a separate folium of such book." Therefore, this is not a book made at a stationer's and to be used from time to time to enter matters in, but it is a book consisting of the grants which are bound up in it. When this lease was presented at the office, its registration consisted in making it a leaf of the Register Book, and until that leaf was there, there was no Register Book in which the registrar could enter this copy fi. fa. Therefore, it was impossible for him to do what he was told by the Act to do, viz., to register this copy fi. fa. when presented to him. It cannot be

contemplated that it was the intention of this section that the registrar was to keep the copy fi. fa. and statement for an indefinite time in order to enter it when he had got a book in which he could enter it. I think the registrar was perfectly right in refusing to register this when there was nothing to register it against. Therefore the mortgage, which was the first thing presented for registration when there was a book in which it could be registered, takes priority.

Judgment for the defendants, with costs.

Solicitors for plaintiff:—Emerson & Barrow.

Solicitors for defendants Cadman and Downie:—Pentland, Roberts & Thompson.

SUPREME COURT, VICTORIA, 1890.] [17 V. L. R. 271.

MATHIESON v. THE MERCANTILE, FINANCE AND AGENCY COMPANY (LIMITED).

"Transfer of Land Statute" (No. 301), secs. 42, 84, and 85—Mortgage—Power of sale—Demand and notice—Notice of sale given prior to registration—Effect of registration.

Instruments executed in the form provided by the "Transfer of Land Statute" (No. 301) are not previous to registration void of all effect except as to conveying, passing or conferring estates or interests and rights in land. They may, before registration, have effect as contracts between the parties to them, or operate as securities springing from the contract from the date of signing; and acts done by the parties under and in accordance with the contracts before registration may, as between the parties, be valid and effectual.

A mortgage in the form provided by the "Transfer of Land Statute" (No. 301) contained a covenant that, in case default should be made in payment of any of the moneys expressed or intended to be thereby secured, and such default should be continued for the space of three days, then all the moneys intended to be thereby secured should become payable and recoverable, and it should be lawful for the mortgagee to serve on the mortgagor the notice mentioned in Sec. 84 of the Act; and on such default in payment continuing for the further space of three days after the service of such notice, it should be lawful for the mortgagee to exercise the power of sale mentioned in Sec. 85 of the Act. The mortgage was not registered for some time after the execution, and in the meantime default in payment was made and continued, and a demand of payment and notice of intention to exercise the power of sale were given.

Held, that the demand of payment and notice of sale before registration of the mortgage were valid and effectual to authorize a sale after registration under Sec. 85.

The word "secured" in Sec. 84 of the "Transfer of Land Statute" (No. 301) refers both to the security created by the covenant to pay the principal and interest contained in a mortgage deed, and in force between the parties before its registration, and also to the security in respect to the land itself, which comes into existence only when the deed is registered.

Action for repayment of moneys paid and return of promissory notes given under a contract for the sale of land, or an indemnity against payment of the notes negotiated.

Previously to 27th January, 1886, one Edward Alfred Patterson was the registered proprietor in fee simple, under the "Transfer of Land Statute," of Crown allotment 2 of Sec. 4, town and parish of Sale. On that date he executed, under the provisions of the statute, and in the form prescribed by the 12th schedule thereof, a document in writing purporting to be a mortgage of the land to the Federal Bank of Australia (Limited) to secure the repayment of certain moneys therein mentioned. On 4th July, 1887, the Federal Bank caused to be served upon Patterson a notice [*272] requiring him to pay the moneys due under the mortgage. On 9th July, 1887, the bank caused to be served on Patterson another notice, requiring him to pay the moneys mentioned in the first notice, and giving him notice that in default the bank would sell the lands comprised in the mortgage. On 23rd July, 1888, the bank transferred to the Mercantile, Finance, Trustees and Agency Company of Australia (Limited), its right, title and interest in and to the said document of 27th January, 1886. On 23rd July, 1888, the Mercantile Finance Company caused to be registered, as required by the Act, the said document or mortgage of 27th January, 1886, and the transfer thereof, and until that date such mortgage never was registered as required by the statute, or at all. At the end of July, 1887, Patterson's estate was sequestrated under the provisions of the "Insolvency Statute, 1871," and Duncan Smith and Benjamin Dowling were, on 2nd August, 1887, appointed trustess of his estate. On 27th February, 1888, Smith and Dowling applied, under Sec. 41 of the Act No. 872, to be registered as proprietors of

the land, and were accordingly so registered, and were now the registered proprietors of the land. On 13th September, 1888, by contract in writing made between the plaintiffs Archibald Mathieson and George Martley Davis (carrying on business as Mathieson & Davis), and John Napper, and the defendants Cornelius Job Ham and Theophilus Job Ham (carrying on business as C. J. & T. Ham) for the defendants the Mercantile Finance Company, the defendant company, as mortgagees of the land, sold to the plaintiffs the said land, subject to certain leases in the contract mentioned, for £4,600, upon the terms and conditions therein mentioned, in accordance with which the plaintiffs paid a deposit of £1,150 to C. J. & T. Ham, and gave their promissory notes for the residue in equal amounts, at six, twelve, and eighteen months, with interest at the rate of six per cent. per annum, upon the express instructions and terms, verbally stated and assented to, that C. J. & T. Ham should not part with them until the title was accepted by the plaintiffs. The title was never accepted by them, but the defendants, C. J. & T. Ham, handed over to the defendant company the money and promissory notes. Shortly after the contract, the plaintiffs inspected title and sent in a requisition stating that the demand on Patterson and the notice of intention to sell were both made and given before registration of the mortgage [*273] and the subsequent transfer was made, and required that a fresh demand and notice must be given by the present proprietors of the mortgage. These requisitions, which were dated 22nd September, 1888, were answered on 5th October, 1888, by letter, stating that the fact of demand and notice being made before registration did not affect their validity, nor was the notice bad because made before the transfer to the vendors. They declined to make a fresh demand, or give a further notice. Some further correspondence took place, but the defendant company still declined to comply with the requisition, and on 15th February, 1889, the plaintiffs wrote demanding a return of their deposit and the promissory notes. The company in reply, on 16th

February, 1889, stated that they held the plaintiffs liable to, and insisted upon the performance of, the contract. Some further negotiations took place, but on 9th April, 1889, the plaintiffs wrote stating that, in view of the long delay that had taken place, they requested that the deposit and promissory notes should be returned. This was not done, but on 25th June, 1889, the company wrote to say that, without admitting the plaintiffs' position to be good, they had fresh demands and notices made and served upon the present registered proprietors and Patterson, in terms of registered mortgage, and that such demands and notices were not complied with, so that the mortgagees were now unquestionably entitled to insist upon the plaintiffs carrying out their purchase. This the plaintiffs declined to do, and brought the present action for a return of the deposit and promissory notes, or an indemnity against those negotiated, making C. J. & T. Ham parties, as they had wrongfully handed them over to the defendant company. The mortgage was in the following form :—

"I, Edward Alfred Patterson, of, etc., being registered as the proprietor of an estate in fee simple in land hereinafter described subject to the encumbrances notified hereunder, do hereby covenant with the Federal Bank of Australia, Limited (hereinafter designated the said bank).

"Firstly—To pay to the said bank or its transferees on demand in writing under the seal of the said bank, or signed in the name of and on behalf of the said bank, by the general manager for the time being of the said bank, or by any other officer or agent of the said bank authorised to make such demand on its behalf, or by the transferees of the said bank, and given to me, my heirs, executors, administrators or transferees personally, or left on the said land, or sent through the post office by a registered letter, directed to me or to the then proprietor of the said land at my or his address appearing in the register book, the balance which shall for the time being be owing by me, [*274] my executors

or administrators, to the said bank on my account current with the said bank, and all and every other the sums and sum of money (if any) which the said bank or its transferees may (but without any obligation on it or them to do so) advance or pay, or become liable to pay, to or on account of me, etc.

"Secondly, etc.

"Thirdly—That in case default shall be made by me, my heirs, executors, administrators or transferees as aforesaid, in payment of any of the moneys expressed or intended to be hereby secured, or any part thereof respectively, or in the observance of any of the covenants contained or implied herein, and any such default be continued for the space of three days, then and in any such case all and singular the moneys intended to be secured by this mortgage shall forthwith and immediately become due, payable and recoverable, and it shall be lawful for the said bank or its transferees to serve on me, my heirs, executors, administrators or transferees, the notice mentioned in the 84th section of the "Transfer of Land Statute," and that after such default in payment continuing for the further space of three days after the service of such notice, it shall be lawful for the said bank or its transferees to exercise the power of sale and all others the powers and authorities mentioned and given in and by the 85th section of the said statute.

"Fourthly, etc.

"Fifthly, etc.

"Sixthly, etc.

"Seventhly, etc.

"And for better securing the payment in manner aforesaid of the said principal sum and interest and other the moneys for the time being hereby secured, and the observance and performance of the covenants aforesaid, I hereby mortgage to the said bank all my estate and interest, and all the estate or interest which I am entitled or able to transfer or dispose of in all that piece of land being allotment 2, section 4, Parish of Sale, County of Tanjil."

Higgins and Isaacs for the plaintiffs:—The demand and notice being made before registration of the mortgage were of no effect. Until registration, the mortgage was of no effect; the provisions of the Act did not apply to it: Secs. 42 and 84 of the "Transfer of Land Statute" (No. 301). The vendors can only make title under the Act, and unless the provisions of the Act have been complied with, cannot pass title to the plaintiffs.

Topp and Mitchell for the defendants:—Sec. 42 does not provide that a mortgage is to have no effect until registered, but merely that it shall not render the land liable to the mortgage. We do not dispute that the land is not mortgaged until registration of the instrument, but we submit that as between the parties to it the instrument is binding, and the covenants in it are binding. Clause 3 amounts to an agreement that what has been done here might be done, and it is submitted that the parties were bound by it. [*275] It is submitted in this case that the demand and notice could be given prior to registration of the mortgage, although the sale could not take place till after registration. The time when notice is to be given is the date of payment. If the plaintiff's contention were correct, if that day has passed before the mortgage has been registered, the money advanced could never be recovered.

[Webb, J.—If the third clause of the mortgage enables you to give notice before registration, why does it not enable you to sell before registration?]

The Act expressly provides that no estate or interest in land under the Act shall be passed by any instrument until its registration, but there is no provision that a mere preliminary act such as giving a notice shall not take place before registration. It is also submitted that when registration took place in this case it related back to the date of default, otherwise there would never be any default after registration, for the mortgage fixes the time at which payment is to be made. In any case, a fresh demand and notice was given after registration.

[Webb, J.—It was after the sale.]

Yes; but at the plaintiffs' request.

Higgins in reply:—Under the Act the legal estate is never in the mortgagee, and the only means of passing it to the purchaser is under the Act. If the Act has not been complied with, the plaintiffs would be liable to Patterson's trustees in insolvency. The only default which gives a power of sale under the Act is a default in payment of money "secured" by a registered mortgage (Sec. 84). It is further submitted that the covenant to pay in the mortgage was not binding until registration of the mortgage, and that, therefore, there was no default in payment.

Cur. adv. vult.

Webb, J.—The only point arising for decision in this case is whether a mortgagee under a mortgage of land under the "Transfer of Land Statute," the mortgage not being registered under the Act, can proceed before registration so far to execute the power of sale under the Act as to serve upon the mortgagor a notice under Sec. 84 to pay the money, and whether, if subsequently the mortgage be registered under the Act, [*276] a valid sale under Sec. 85 can be made based upon the prior notice to pay. Looking at the various sections of the Act, I am of opinion that before any steps towards a sale can be taken the mortgage must be registered. The various sections follow in sequence, and hang one upon another. Sec. 42 provides that no instrument until registered in manner therein provided shall be effectual to render any land under the operation of the Act liable to any mortgage, but upon such registration the land shall become liable. Sec. 84 provides that a mortgage under the Act shall, when registered, have effect as a security. Therefore, until registered, it is not a security, and the money is not "secured" on the land. The section then proceeds: "In case default be made in payment of the principal sum 'secured,' and such default be continued, etc., the mortgagee may serve on the mortgagor a notice in writing to pay," etc. But no default can be made in payment of the sum "secured" until it is secured, and it

is not secured until registration of the mortgage. Then Sec. 85 provides that if such default in payment of the "sum secured" continue for the prescribed time after the service of such notice the mortgagee may sell. Therefore the power of sale only arises on default in payment after service of a notice under the Act, which notice can only be effectually served after registration of the mortgage, and no registration of it after service of the notice but before sale will validate the antecedent notice, or render a subsequent sale good. Here, after the sale in question, a fresh notice was served, and it is argued that such notice being valid under the Act rendered the prior sale effectual. But such notice only raised the power of sale, and enabled it to be validly exercised. It could not ex post facto validate a sale previously invalid. It has been argued for the defendants that this mortgage, although not authorising a sale under the Act, was good outside the Act as between the parties to it, and as between them authorised a sale. Such a principle has been held to apply to unregistered bills of sale as in Tidyman v. Collins,[1] and if this were an action upon the covenant in the mortgage, I might be pressed with the argument. But here the mortgagee, vendors, can only take title under the Act, and, unless the provisions of the Act are complied with, [*277] can give no title whatever to the purchasers. Sec. 87, which is the only section under which title can be made, provides that upon the registration of any transfer signed by a mortgagee, "for the purpose of such sale as aforesaid," the estate and interest of the mortgagor shall pass to and vest in the purchaser freed and discharged from all liability on account of such mortgage. But "such sale as aforesaid" is a sale after a valid notice under Sec. 84, and here there was no such valid notice. The defendant company is therefore unable to give a good title, and the plaintiffs are entitled to a return of the money paid by them both as deposit and in payment of such of the bills as have fallen due, and a return of the bill unpaid, or an indemnity, if such bill is in the hands

[1] 4 V. L. R. (L.) 478.

[illegible]

[illegible]

[illegible]

that otherwise they should be null and void against assignees in insolvency and persons seizing under process of law, and it was held that they were still valid against persons not named. It was then found necessary to provide in the Act No. 557 that they should be of no validity at law or in equity until registered. Therefore, where the Legislature wished to make an instrument void in all respects inter partes it so provided in express terms.

[a'Beckett, J.—I do not think that the learned primary Judge took the view that the document was a nullity until registration, but simply that you cannot give notice of sale under the statute, except under the provisions of an instrument duly registered.]

If the document is not a nullity as between mortgagor and mortgagee, it amounts to an agreement that the money shall be paid on a definite day, and that in default the property may be sold. The deed executed is a security for the money lent.

[Hodges, J.—No ; it is not a security any more than a bill of sale is. When registered the land comprised in it would be a security.]

No doubt the "Transfer of Land Statute" (No. 301), Sec. 42, provides that no instrument until registered shall be effectual to pass any estate or interest in any land under the Act, or render such land liable to any mortgage, but it is submitted that inter partes the instrument may still be binding before registration.

[Higinbotham, C.J.—It was held in Morrissy v. Clements[2] that that section was to be read with reference to the land only, and that an unregistered lease was valid and binding as between the parties to it. Your mortgage provides, thirdly, that on default the bank might serve the notice mentioned in the 84th section, and, after such default continuing for three days after service of notice, might exercise the power of sale, and all others the powers and authorities mentioned and

[2] 11 V. L. R. 13.

given by the 85th section. [*279] How can you exercise the powers under Sec. 85 unless the mortgage is registered? Why do you say that the notice may be given before registration when all other things must be done after?]

All other things affect the title to the land, which the Act says is not to be charged until registration. The giving of notice is a preliminary matter agreed on between the parties.

[Hodges, J.—Notice is to be given by the "mortgagee" to the "mortgagor," but there is no mortgagee or mortgagor until registration.

a'Beckett, J.—If we are to read "mortgagee" and "mortgagor," "statutory mortgagee" and "statutory mortgagor," there is not.]

The words, it is submitted, merely mean the parties to the document. The Act itself speaks of these instruments as "mortgages" or "charges" before registration, e.g., the first words of Sec. 84 and Sec. 116, the latter of which speaks of an estate or interest in a mortgage or charge under an unregistered instrument. If the mortgage fixes a day for payment which passes before the instrument is registered without payment having been made, when registered it is submitted that it relates back so as to make it a default in payment on that day, because, when registered, it is by Sec. 84 to be a security for the money. If that be so, the notice would run from the time of default. If it were otherwise, there never would be any default, and the money advanced could not be recovered.

[Higinbotham, C.J.—I understand the learned primary Judge to intimate that you might have a remedy on the covenant, but not under the Act.]

If the parties can waive the formalities required by the Act (and the practice of the Titles Office shows that it is considered that they may), then they have done so by clause 3, which has in this case been complied with in every respect. That clause refers to default in payment of the moneys intended to be thereby secured,

and it is amply wide enough to cover moneys due on the mortgage, although it is not registered. By Sec. 61 every transfer and other instrument shall be deemed of the same efficacy as if under seal, and when registered shall be as valid as a deed for the purpose of conveying the estate. A mortgage, when registered, has a retrospective effect: Tierney v. Halfpenny;[3] McEllister v. Biggs.[4] Equitable mortgages, though not registered under the Act, are frequently enforced by this Court.

Higgins and Isaacs for the respondent:—The object of the third clause of the mortgage was merely to reduce the time of the running of default in payment from one month to three days, and was not intended to give the document any effect before it was registered, or to confer any power of sale except that provided by the Act. Sec. 61 does not affect the matter, for it says that when "signed by the proprietor and registered" a transfer or other instrument shall be effectual to pass the estates. It cannot be contended that the document is to be deemed to have the same efficacy as if under seal before it is signed by the proprietor; why then should it have before it is registered? Sec. 42 expressly provides that no instrument, until registered, is to render any land liable to a mortgage, but upon registration the land shall become liable "in manner and subject to the covenants and conditions set forth and specified in the instruments or by this Act to be implied." Sec. 37 shows that a mortgage is to operate only from the time of its production for registration. Sec. 84 says that when registered it shall have effect as a security, and the default referred to in that section is default in payment after registration. Sec. 85, using the term "such default," relates back to that referred to in Sec. 84. Apart from the Act, the mortgagee would have no power to give the notice on default, because the covenants in the instrument are not under seal. The Act itself only gives power to give the notice on breach of the covenants in a registered mortgage. The appellant had a power of

[3] 9 V. L. R. (Eq.) 152.
[4] 8 App. Cas. 314.

sale only under the Act, and the notice of intention to exercise it must be only under the Act also. No doubt equitable mortgages of land under the Act are recognised, but they only amount to a contract to give a mortgage under the Act. Where the Act requires a notice, the parties cannot waive it: Forster v. Hoggart;[5] National Bank of Australia v. United Hand in Hand and Band of Hope Co.[6]

Mitchell in reply.

[*281] [a'Beckett, J.—If a transfer of land under the Act were not registered for some time, to whom would the interim rents and profits belong?]

To the transferee when the transfer was registered.

Cur. adv. vult.

Higinbotham, C.J.—On 27th January, 1886, E. A. Patterson executed an instrument of mortgage of land brought under the operation of the "Transfer of Land Statute" to the Federal Bank of Australia (Limited), to secure payment on demand in writing of the balance owing on his current account. On 4th July, 1887, and before registration of the mortgage, demand of payment was made, and on 9th July, 1887, and before registration of the mortgage, notice of sale was given in accordance with the covenant of the mortgage. On 23rd July, 1888, the Federal Bank transferred its right, title, and interest in the mortgage to the defendants, the Mercantile, Finance, Trustees and Agency Company of Australia (Limited), and on the same day the defendant company caused the mortgage and the transfer to be registered. The plaintiffs on 13th September, 1888, purchased the land from the defendant company as mortgagees; they did not accept title, and this action is brought to recover money paid, and for the return of promissory notes given, on account of the purchase money, on the ground that the defendant company had not, when the contract was made, any power to sell the land, or to give title

[5] 15 Q. B. 155; 19 L. J. Q. B. 340.
[6] 4 App. Cas. 391.

thereto. The learned primary Judge held, upon the construction of Secs. 42, 84 and 85 of the Act, that before any steps towards a sale of mortgaged land can be taken the mortgage must be registered, and that the demand of payment and notice of sale before registration were invalid and ineffectual to authorise a sale under Sec. 85. This construction of the Act assumes that an instrument of mortgage is void of all effect as a security until it is registered ; and this assumption, if it be true as to a mortgage, will apply equally to a transfer, lease, sub-lease, and charge and creation of an easement, all of which are included in the term "instrument," and are subject to the same limitation of effect before registration as a mortgage. We think that the terms of the Act relating to instruments do not require or warrant [*282] such a construction. By Sec. 42:—

"No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Act, or to render such land liable to any mortgage or charge ; but upon such registration the estate or interest comprised in the instrument shall pass, or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument or by this Act declared to be implied in instruments of a like nature."

Sec. 61 provides that :—

"Every transfer or other instrument shall be deemed of the same efficacy as if under seal, and when signed by the proprietor and registered shall be as valid and effectual to all intents and purposes for conveying, passing, or conferring the estates, interests or rights expressed to be thereby transferred, leased or credited respectively as a deed duly executed and acknowledged by the same person would have been under any law heretofore or now in force in Victoria, or as any other form of document would have been either at law or in equity."

The language of both of the sections points to one

particular effect of registration of an instrument, namely, the conveying, passing or conferring estates, interests, and rights in the land; it does not expressly negative or withhold from the instrument, before registration, any other effect. It is consistent with these sections that an instrument may before registration have effect as a contract between the parties to it, and may operate as a security springing from the contract as from the date of the signing of the instrument, and that acts done by the parties under and in accordance with the terms of the contract shall as between the parties be valid and effectual before registration. This view is supported by authority in Morrissy v. Clements.[7]

[In that case] Mr. Justice Molesworth said :—

"Defendant's counsel insisted that under Sec. 42 documents shall be of no effect until registration. I read that with reference to the effect upon the land only, and would say that the plaintiff would have no title to the land as against a registered conveyance from the defendant, and that the cancellation made the registration impossible. But I think, notwithstanding that clause, that an unregistered document, as the lease, would be valid as between the parties as a contract, and that notwithstanding its destruction."

In McEllister v. Biggs[8] it was held by the Privy Council, upon the terms of a section of the Act of South Australia, corresponding in effect with Secs. 42 and 61 of the Victorian "Transfer of Land Statute," that unregistered deeds, [*283] although they did not pass an interest in the land, were effectual to pass the equitable right to set aside a certificate of title on the ground of fraud, and were not, therefore, a nullity before registration. Sec. 84 has been chiefly relied on as favouring the view adopted in the judgment appealed from. The primary purpose of Sec. 84 is to define the special nature of a mortgage under the Act as it affects the land. When registered a mortgage shall have effect as a security,

[7] 11 V. L. R. pp. 21-2.
[8] 8 App. Cas. 314.

and shall operate as a transfer of the land. The section then provides that in case default be made in payment of the principal sum or interest secured, or in performance or observance of any covenant expressed or implied in the mortgage, and default be continued for one month, the mortgagee may serve on the mortgagor notice in writing. I think that the word "secured" in this sentence may fairly be held to refer both to the security created by the covenant to pay the principal and interest contained in the mortgage deed and in force between the parties before the registration of the deed, and also to the security in respect to the land itself which comes into existence only when the deed is registered. If the term "secured" in this section will bear this interpretation, the difficulty suggested by the word disappears, and default in the principal sum and interest secured may take place, and effectual notice to pay may be served before registration of the deed. I am of opinion, for these reasons, that the learned Judge was in error in holding that the demand of payment and notice of sale before registration were invalid and ineffectual to authorise a sale under Sec. 85. The appeal will be allowed with costs. The judgment for the plaintiffs will be set aside, and judgment will be entered for the defendants with costs.

a'Beckett, J.—The judgment under appeal altogether depends upon the meaning given to the words "in case default be made in payment of the principal sum, interest or annuity secured" in Sec. 84 of the "Transfer of Land Statute." It decides that, inasmuch as by the preceding provision of the same section a mortgage is only to have effect as a security when registered, there is no sum "secured" until registration of the mortgage, and, therefore, no default in payment can arise within the meaning of the section until after registration. This seems to me an unnecessarily strict construction, opposed to what may fairly be presumed to have been the intention of the framers of the Act. The object of this part of Sec. 84 was to describe the nature of the default which would authorise a sale by the mortgagee,

and such default is not confined to payment of money, but includes default in performance or observance of any covenant express or implied; and with regard to the latter class of default there are no words which can be said to make registration of the mortgage a necessary preliminary. As regards both classes of default, as between mortgagor and mortgagee, the breach of duty and consequent injury to the mortgagee are the same whether the mortgage be registered or unregistered, and both should give the mortgagee the same remedy. The Act nowhere requires immediate registration of instruments executed under its provisions, and it seems unreasonable that failure to pay money due should count for nothing up to the time of registration. The use of the word "secured" in describing the sum as to which default arises seems to me insufficient to bring about this unreasonable result. The mortgage money is in a sense secured from the time the mortgage is signed, though the complete security over the land is not acquired until after the mortgage is registered, and when the mortgage is registered it operates as from its date, so that the debt is retrospectively secured over the land as from the date of the mortgage. When no rights of third persons have intervened the registered instrument operating under Sec. 61 as a deed determines the rights of the parties as from its date, not as from the date of its registration. No rights of third persons have arisen in the case before us. The objection to the exercise of the power of sale rests altogether upon the alleged insufficiency of the default on which its exercise depends as having occurred before registration of the mortgage. I therefore think that the appeal should be allowed.

Hodges, J.—I concur.

Solicitors for plaintiffs:—Madden & Butler.

Solicitors for all defendants:—Fink, Best & P. D. Phillips.

VICTORIA, 1885.—MOLESWORTH, J.] [11 V. L. R. 733.

PLUMPTON v. PLUMPTON.

"Transfer of Land Statute" (No. 301), sec. 42—Certificate of title—Voluntary transfer—Deposit by way of security—Registration.

A person depositing as a security a certificate of title in the name of a third party, gives to the depositee only such right as the depositor has against the registered proprietor.

A certificate of title of land under the "Transfer of Land Statute" (No. 301), and a transfer by the registered proprietor to A. for a nominal consideration, were lodged by A. with a bank as security for an overdraft without the bank having notice of any claim to the land by any person other than A. The transfer was not registered.

Held, that the bank was not entitled to hold the land as a security as against the registered proprietor.

Semble, the bank would have been protected if the transfer had been registered under the "Transfer of Land Statute" (No. 301).

Semble, cases as to allowing title deeds to be in the hands of an owner instead of an encumbrancer and thereby enabling the owner to conceal the fact of an encumbrance, are not applicable to the custody of certificates of title.

Action for the delivery up of a certificate of title and a transfer of certain land under the "Transfer of Land Statute" (No. 301), on payment by the plaintiff to the defendants of £20; and for an injunction to restrain the registration of the transfer.

The plaintiff was the registered proprietor under the "Transfer of Land Statute" (No. 301), of a piece of land at Carlton. In August, 1884, he deposited the certificate of title thereof with the defendant Alfred Plumpton, as the plaintiff alleged, as a security for a loan of £20. On the 23rd September, 1884, the plaintiff, being absent from Victoria, at the suggestion of the defendant Alfred Plumpton, executed for the alleged consideration of 10s., a transfer of the land to the defendant Charlotte Plumpton, the wife of Alfred Plumpton. She deposited the certificate and transfer with the defendant the City of Melbourne Bank (Limited), as security for certain advances made by it to her.

The defendants, Mr. and Mrs. Plumpton, alleged that the land was given to Mrs. Plumpton, who was the plain-

tiff's niece by marriage, as a voluntary gift by the plaintiff, but admitted that on 5th August, 1884, Mrs. Plumpton did lend the plaintiff £20.

The defendant bank claimed to hold the certificate and transfer as security for its advances, and offered to deliver them [*734] up to the person entitled thereto on being paid the amount of such advances, which with interest amounted to £90, and its costs of this action.

Higgins, for the plaintiff :—The action is for the redemption and delivery up of the certificate of title upon payment of £20. The transfer of that certificate has not been registered under the "Transfer of Land Statute" (No. 301), and the plaintiff is still the registered owner of the land. If there was a voluntary gift as alleged by the defendants the gift is incomplete under Sec. 42 of the Act, and the plaintiff is entitled to restrain any dealing with the land by Mr. or Mrs. Plumpton or by the bank. Even if the bank had no notice of the claim by the plaintiff the ordinary principle of prior equities prevails, and the plaintiff's equity is prior to that of the bank.

Topp, for the defendants, Mr. and Mrs. Plumpton :—Mrs. Plumpton's case is that the plaintiff made a voluntary gift to her. The case made by the statement of claim is that of an ordinary redemption of a mortgage to the defendant Mrs. Plumpton. The defendant Alfred Plumpton is an unnecessary party to such an action, as Mrs. Plumpton has separate estate.

a'Beckett for the defendant, the City of Melbourne Bank (Limited) :—The bank had no notice whatever of the plaintiff's claim when it advanced the money, and should not therefore be held liable to him. The cases show that it is unnecessary that the depositor of title deeds should be the owner of the land comprised in them in order to secure the person lending money upon them. Where a mortgagee of leasehold property sent the lease to the mortgagor for the purpose of raising money upon it, but at the same time told him to inform the person from whom he was borrowing money upon it of his

prior charge, and the mortgagor borrowed money from his bankers upon the security of a deposit of the lease without giving them notice of the mortgage, it was held that the mortgage must be postponed to the banker's lien: Briggs v. Jones ;[1] and the same principle was applied in Perry Herrick v. Attwood.[2]

[*735] Higgins, in reply :—The plaintiff's equity being prior to that of the bank it does not matter whether the bank had notice of his claim or not, especially as the bank could see by the transfer itself that it was voluntary. In the cases cited for the defendant bank, the borrower actually had the legal estate in the lands, but here Mrs. Plumpton had not, as the transfer to her was not registered.

[Molesworth, A.C.J.—She had the certificate of title and a transfer from the registered proprietor, with a right of registering it. I think the bank was entitled to assume that the person who had a power at any moment to register herself, had such an interest that they might lend upon it. It would be carrying the provisions of the "Transfer of Land Statute" (No. 301) very far if it were otherwise.]

The bank lent the money on her apparent right to get the estate, and could have protected itself under the Act by getting the transfer registered. It has been held with regard to a bill of sale that even as between the parties to it there is no right at all until it is registered, and the provisions of the "Transfer of Land Statute" are just as express as to registration as the Bill of Sales Act.

Cur. adv. vult.

MOLESWORTH, A.C.J.—

The plaintiff, Mr. Anthony Plumpton, is uncle of the defendant, Mr. Alfred Plumpton, whose wife is the defendant Mrs. Charlotte Plumpton. The plaintiff's

[1] L. R. 10 Eq. 92.
[2] 25 Beav. 205.

children were with the defendants as a matter of compliment, not to be paid for, but the treatment of them, past or expected, might be a motive for voluntary gift.

The plaintiff is an engine driver in narrow circumstances; he had a property in Carlton, vacant land, worth about £200, also some houses and land at Brunswick; but he appears not to have been as well off as the defendants, who had only a grown up son. The defendants were music teachers, keeping a house and servants, and having each a separate banking account.

[*736] The plaintiff's version of the transaction between them is that before proceeding to Sydney and thence to Bolivia, which he commenced 8th August, 1884, it was arranged between him and the male defendant that he should transfer his title under the Act No. 301 to the male defendant, to raise money and build on his account, as a trustee for him; also that he got from the male defendant a loan of £20, and his certificate of title was lodged as a security for it with the male defendant. His case is as if all his dealing was with the male defendant, though he got the £20 loan by Mrs. Plumpton's cheque, that he gave the male defendant a blank form of transfer, which he got back and took with him to Sydney, intending to get it filled there. Not being able to have it filled up without deeds in Sydney, he sent it still in blank to the male defendant, who had it filled as it stands, a transfer to the female defendant, as in consideration of 10s.; that it was filled in Melbourne and sent to him to Bolivia, where it was duly executed by him and sent back to Melbourne to the male defendant. He gave no reason for executing it to the female defendant, and he was not asked by the defendants' cross-examination to give any.

He says that finding nothing done as to the building, he applied through a solicitor to get his certificate and the transfer back, offering to pay the £20, and some other money received from the male defendant, who promised to return them, at the same time offering to complete on an alleged agreement for sale. He then discovered

that the female defendant had lodged the certificate of title and the transfer with the defendant, the City of Melbourne Bank (Limited), about 9th October, 1884, which claims as for £90 overdrawn by her after the deposit, and the bank, when called upon to give up the documents, set out this case. The action was commenced on 20th August, 1885. The defendants Plumpton join in their defence of a voluntary gift, but have given separate evidences. The female says that two or three months before he went to Sydney the plaintiff of his own motive proposed to give her the land in question, and in part fulfilment of that intent handed her the certificate of title; that he afterwards brought her a blank form of transfer; that at her husband's [*737] request she lent him £20, that the documents were not at all intended as a security for it; that the transfer was filled as to her, and sent to her, and she used it as her property, depositing it in the bank for her purposes. Her husband corrobates her as to having partly heard the conversation in which the plaintiff offered the gift. He altogether denies any arrangement for conveying this land to raise money for building. But he says that just before plaintiff went to Sydney he spoke to plaintiff and said he could not allow the land to be given as a present to his wife; that he would pay the plaintiff the value of it by instalments. The plaintiff is very deaf and not easily understood, and I think is quite wrong as to the assertion that the deposit was a security for a loan.

There is a clear conflict of testimony, and we should look carefully to such light as is thrown by letters, etc. I must regard the defendants, husband and wife, as communicating facts between themselves, and responsible for each other's writing and doing. In a letter dated 12th August, 1884, from plaintiff at Sydney to the male defendant, he speaks of its being impossible to fill the transfer at Sydney without the deeds. He says: "I enclose to you the transfer, so that if you still think well of it you had better get it filled up, then forward it to me, then I will sign," etc. "The value of the land is £8 10s. per foot, this being the price I mentioned to you."

This does not look like any intention to make a present to the female defendant. It might mean an intent to convey to her at a price to be paid by her husband, and that, rather than an arrangement that the husband should build as a trustee for the plaintiff. The next important letter I have to deal with is one from the male defendant to the plaintiff, sending the transfer filled: "I enclose the paper for you to sign before a notary and enclose you I.O.U. for £200 as security, so that when you come back you can have the paper re-transferred back to you." There is nothing in this like the transfer being a mere gift. "I shall send you a cheque next month for another £20. I shall send you all designs, of course, for your approval, and wait your instructions." He in some indistinct way said that "designs," etc., referred to some Brunswick property. He said the re-transfer in the letter [*738] referred to his not being able to pay the price stipulated. There was a number of letters from the plaintiff's solicitors to the male defendant, beginning 23rd March, 1885, demanding a return of the certificate and transfer. He never attempted to refer to a gift to his wife. On one occasion he spoke to plaintiff's solicitor about a contract for sale. At one time he distinctly promised to return the deeds. The fact of the female defendant having deposited them in the bank as a security to it was not referred to.

On the whole, after much doubt, I have come to the conclusion that both the defendants getting the transfer knew that it was not intended as a deed of gift to the female, and they were not warranted in claiming it as such. If it were a gift, plaintiff might defeat it by a sale to a purchaser; if the security to the bank was binding, I would hold the other defendant bound to indemnify the plaintiff from it. I have had much doubt upon the subject.

The bank makes the usual case:—"We got the documents honestly; there is money due to us, and we have a right to keep them." There was no writing. The female defendant says nothing as to what occurred between her and the manager; so as to a person who

accompanied her. The manager is absent. The transfer being as in consideration of ten shillings would be understood to be voluntary, therefore liable to be defeated by a conveyance for value. If the manager had insisted upon the transfer being registered, he would have got the protection of the Act (No. 301), Secs. 42 and 47, but not, I think, till then. In the meantime, I think the plaintiff by suit might restrain the transfer if it would operate as a fraud upon him.

Deposits of certificates have been recognized so as to enable the holder to stop transferring by proprietors, inconsistent with his right, and as a badge of ownership, entitling the holder to enforce transfers from all persons having no better equitable right. The proprietor sanctioning a transfer by delivering his certificate gives a title generally available, but we have never come to a system of treating properties as transferable by the manual delivery of a certificate as a symbol of ownership. A person holding a certificate as the female defendant, or depositing it as a security, gives only such right as she would have against the [*739] proprietor. Cases as to allowing title deeds to be in the hands of an owner, instead of an encumbrancer, and thereby enabling the owner to conceal the fact of an encumbrance, such as Perry Herrick v. Attwood[3] and Briggs v. Jones,[4] to which I was referred by counsel for the bank, are not, I think, applicable to the custody of certificates of title. There is no reason to say that the plaintiff contemplated the male defendant raising money for building by depositing the certificate in the bank.

The bank has put in a counter-claim seeking to enforce the security of the deposit for the debt of the female defendant and the costs of this suit, and part payment by sale, which I am not disposed to grant, as I think the claim of the female defendant against the plaintiff inequitable and to be set aside. The £20 was, I think, an unsecured loan.

[3] 25 Beav. 288.
[4] L. R. 10 Eq. 92.

I shall direct the plaintiff to pay it to either of the individual defendants or the bank, as his complaint offered to pay it, if the bank wishes to take it in part discharge of the female defendant's debt to it. I shall restrain the defendants from registering the instrument of transfer of 23rd September, 1884, and order the defendant bank to hand over that transfer and the plaintiff's certificate of title to him. I shall leave the parties to abide their own costs of this action, without prejudice to the claim of the defendant bank to recover its costs of this action against the other defendants.

Solicitors for plaintiff:—Vaughan & Derham.

Solicitors for defendant Plumpton:—Abbott.

Solicitors for defendant, the City of Melbourne Bank:—Malleson, England & Stewart.

SUPREME COURT, VICTORIA, 1879.] [5 V. L. R. 59.

IN RE THE "TRANSFER OF LAND STATUTE," EX PARTE ELLISON, EX PARTE AMESS.

"Land Act, 1869" (No. 360), sec. 20, sub-sec. V.—Lease of Crown Land—Condition not to assign without sanction of Governor—Transfer by sale under fi. fa.

A condition inserted in a Crown lease under the "Land Act, 1869" (No. 360), Sec. 20, Sub-sec. 5, that no assignment or transfer should have any validity whatever, until sanctioned by the Governor in Council, does apply to an involuntary assignment, as by a sale under a writ of fi. fa.

Summons to the Registrar of Titles.

The first summons called upon the Registrar of Titles to substantiate and uphold the grounds, given in pursuance of Sec. 135 of the "Transfer of Land Statute," of his refusal to register a certain writ of fi. fa. in an action in the Supreme Court against W. J. Scarlett, at the suit of John Ellison, which was served on the said registrar, accompanied by a statement, as required by Sec. 106 of the said Act, specifying a certain Crown lease as the lease sought to be affected by such writ.

On the 26th August, 1878, the writ of fi. fa. issued to levy £605 recovered in the action. Scarlett was then the lessee for a term of years, from the Crown, of the land

in question, under the provisions of Sec. 20, Sub.-sec. V., of "The Land Act, 1869." After due advertisements, the sheriff, on 18th October, sold by [*60] auction the defendant's interest in such land to one Sam. Amess for £350, which was immediately paid, and a transfer of that date executed by the sheriff. On 29th November, a copy of the writ was lodged in the office of the Registrar of Titles, together with a statement of the land sought to be affected thereby; and, on the same day, was lodged the transfer, together with a statutory declaration of the sheriff's officer, verifying the due advertisement of the sale. The registrar, on that day, marked on the copy writ the time of service, but refused to enter it in the register book. The lease contained the following condition :—

"Provided further, and these presents are upon the express condition, that no assignment or transfer of these presents, or other instrument affecting the premises hereby demised shall have any effect or validity whatever, unless and until the Governor, acting by and with the advice of the executive council, sanction the same; and further, until the same be registered in the Office of Crown Lands, and all such instruments as aforesaid shall have and take priority, not according to their respective dates, but according to the priority of the registration thereof."

The grounds of the refusal to register set out this condition, and stated that the copy writ had not been registered in the Office of Crown Lands.

The second summons was of a similar character, on behalf of Amess, the transferee; and, both involving the same point, were argued together.

Webb, Q.C., for the Registrar of Titles, showed cause: —As the lessee accepted the lease with such a condition, he, and of course those claiming through him, are bound by it, even if the insertion of such a condition were unwarranted by "The Land Act, 1869": Matt v. Peel.[1] Section 106 of the "Transfer of Land Statute" (No. 301),

[1] V. L. R. M. 27; 2 A. J. R. 133.

provides that a transfer in pursuance of a sale under a writ of fi. fa. shall have the same effect as if made by the proprietor. Therefore, as a transfer by the proprietor of this lease would have had no effect until sanctioned by the Governor in Council and registered in the Office of Crown Lands, so the transfer by the sheriff is inoperative, and ought not to be registered until that condition has been complied with. It is not now a question whether the transferee could enforce a registration in the Office of Crown Lands. The condition is not [*61] in the nature of a mere covenant not to assign without certain consent, in spite of which a transfer by operation of law might take place; it is a condition essential to the existence of the estate of a transferee, without compliance with which no such estate can come into existence. R. v. Board of Land and Works, Ex parte Jacomb,[2] does not apply, as that was the case of a mandamus to the board to register.

Worthington in support of the summons:—The condition in question does not comprise an assignment by operation of law, or a devolution in invitum; and that is the nature of the transfer now in question. To prevent an assignment by operation of law, express words for the purpose must be used. The words "or other instrument," in the condition, must be understood as ejusdem generis with the assignments or transfers previously mentioned, which clearly refer only to voluntary transfers: Doe d. Mitchinson v. Carter.[3] The lease itself is already registered under the Act. The provision for the sanction of the Governor in Council shows that it refers to voluntary transfers. No such sanction can be required to the due process of a court of justice to enforce its judgment. "Sanction" means the official act of a superior ratifying the action of an inferior: Webster's Dictionary. That cannot apply to the process of the Supreme Court. The condition is, of course, intended to exclude an objectionable transferee. How can that operate against the registration of a writ of

[2] 6 W. W. & a'B. L. 38.
[3] 8 T. R. 57.

fi. fa. before there is any transferee? The transferee has the estate by virtue of the execution and sale; he could maintain trespass, even against the judgment debtor. The condition is not a condition precedent to the existence of the estate, and does not differ from a covenant not to assign. If it be a condition precedent, it only applies to a voluntary assignment. But it is inoperative even to that extent, its insertion not being warranted by "The Land Act, 1869" (No. 360), Sec. 20, Sub.-sec. V., which specifies what covenants a lease is to contain.

Webb in reply:—The terms of the condition are large enough to comprise assignments by operation of law. The lease is in [*62] effect a lease until assignment without sanction. This question should be contested with the Minister of Lands; it is not a question for the Registrar of Titles to deal with. The case of Doe v. Carter[4] merely decides that a tenant is not guilty of a breach of covenant by the operation of legal process.

Cur. adv. vult.

Per Curiam. The matter to be decided upon these applications is whether the Registrar of Titles was justified in refusing to register the writ of fi. fa. and the transfer thereunder; and the solution of that question depends upon the effect of a condition inserted in the lease from the Crown under "The Land Act, 1869" (No. 360), to one Scarlett, of the land sought to be affected. [His Honour read the condition, ante [*60], p. 503. Does this condition include voluntary assignments by operation of law, as well as voluntary assignments by the lessee? The sheriff sold the lessee's right under a writ of fieri facias and the purchaser desired to have the transfer under that sale registered.

The words "no assignment or transfer," prima facie, imply that the act of transferring or assigning is something to be done by the lessee himself, and the words "or other instrument" are to be interpreted as ejusdem generis. But the words "without the sanction of the

[4] 8 T. R. 57.

Governor in Council" remove any doubt that might possibly have existed. They imply the exercise of a certain discretion. To hold that the condition extends to involuntary assignments would be in effect declaring that such sanction was necessary to give validity to that which the law has already declared should be done. What course would be required to alter that law need not now be considered; but, assuming the Legislature contemplated such an object, language somewhat similar to that used in the case of licenses would, no doubt, have been adopted. Sub.-sec. II. of Sec. 20 of "The Land Act, 1869," provides that the license shall contain the following conditions:—"That the licensee will not during the currency of such license assign the license, nor transfer his right, title and interest therein, or in the allotment therein described, [*63] or any part thereof, nor sublet the said allotment or any part thereof, and that the license shall become absolutely void on assignment of such license, whether by operation of law or otherwise, or upon the said allotment or any part thereof being sublet." No doubt can well arise as to the effect intended by the use of these words. They comprise involuntary as well as voluntary assignments; but the words "transfer or assignment" in Sub.-sec. V., taken in connection with the word "sanction," show that voluntary assignments only were meant; and the reason these words were used is obvious. It might well be deemed undesirable to allow of a transfer to particular persons, although it would be a hardship to deprive a creditor of his right to enforce payment of his claim against his debtor.

This interpretation is borne out by Doe d. Mitchinson v. Carter,[5] which, no doubt, was the case of a covenant; but such a provision must have the like meaning, whether contained in a covenant, a condition, or a statutory enactment. The same point has been substantially decided in Ex parte Jacomb.[6] It may be that the purchaser can

[5] 8 T. R. 57.
[6] 6 W. W. & a'B., L. 48.

be compelled to hold on the same terms as the original lessee, and that, before the purchaser will be able to transfer, he must obtain the sanction of the Governor in Council; but it is not necessary now to decide that question.

The order of the Court will therefore be that the Registrar of Titles register the writ of fieri facias and the assignment by the sheriff.

Order accordingly.

Attorneys for the applicants:—Cleverdon & Eggleston.

Attorney for the Registrar of Titles:—Gurner, Crown Solicitor.

1889.—HODGES, J.] [15 V. L. R. 424.

DAVIS v. DOUGALL.

Vendor and purchaser—Contract for sale of land—Specific performance—Condition of sale—Title—Bringing land under the "Transfer of Land Statute" within six months—Rescission—Time of the essence of the contract—Waiver—Costs.

By the first of the conditions of sale attached to a contract for the sale of land, it was provided that the purchase money should be £100 a foot, payable £300 in cash, and the balance, without interest, on acceptance of title within fourteen days; but, failing the acceptance of title within that time, then such balance should be payable within two days of production of certificate of title, clear of encumbrances, in the vendor's name. The second condition provided that the vendor should have the right to bring the land under the "Transfer of Land Statute," and if the purchaser should not accept title within fourteen days, the vendor should forthwith lodge an application under the Act, and use his best endeavours and make all payments necessary to bring the title under the Act within six months from the date thereof. By the third condition it was provided that if the vendor failed to procure a certificate of title under the Act within six months from the day of sale, the purchaser should be at liberty to reject the title, and thereupon his deposit should be returned to him. The contract was dated 5th June, 1888, requisitions on title were made on 16th June, 1888, and answers thereto sent in on 28th June. The purchaser not being satisfied with the answers, refused to accept the title, and required that the land should be brought under the Act by the vendor. Negotiations were then entered into between the parties to complete the matter without bringing the land under the Act, but they eventually fell through on the 20th July, and the vendor then applied to bring the land under the Act. On the 5th December, the day the six months expired, the application was approved of by the Examiner of Titles, and on the same day the Commissioner of Titles assented to the application, and the purchaser was informed of this, but the certificate of title was not issued until the 20th December. Meanwhile the purchaser rescinded the contract on the ground that a certificate of title in

the name of the vendor had not been produced within six months from the day of sale, whereupon the vendor brought an action for specific performance of the contract.

Held, that time was of the essence of the contract in respect of the third condition, and that it was the duty of the vendor, immediately on the purchaser's refusal to accept the title, to take steps to get a certificate of title as soon as he could, and that the fact of negotiations having been entered into to dispense with the necessity of bringing the land under the Act did not amount to a waiver of the purchaser's right to insist on time being of the essence of the contract in regard to the six months, but that the defendant was not entitled to costs, as the land had been practically brought under the Act, and he could have dealt with it as if he had the title in his own hands.

In order that an act may be a waiver of a condition of sale, it must be inconsistent with the idea that the party is still going to rely on the condition.

Action by George Davis against James Dougall for specific performance of a contract, by which the defendant agreed to purchase from the plaintiff land having 31 feet frontage to Spencer street, by a depth of 88 feet to a right of way, at the price of £100 per foot. [*425]

The contract of sale was in writing, and to it were attached conditions of sale. The first of these conditions was as follows :—

"1. The purchase money for the whole property shall be the sum of £100 per foot, payable £300 cash on the signing hereof, and the balance without interest, on acceptance of title, within fourteen days; but, failing the acceptance by the purchaser of the vendor's title within the time named, then such balance shall be payable within two days of production of certificate of title, clear of encumbrance, in the vendor's name."

The second condition was :—

"2. The vendor shall have the right to bring the title to the property under the 'Transfer of Land Statute,' and if the purchaser shall not accept title within fourteen days, the vendor shall forthwith lodge an application under the 'Transfer of Land Statute,' and use his best endeavours and make all payments necessary to bring the title under the 'Transfer of Land Statute' within six months from the date hereof."

The third condition was :—

"3. If the vendor fail to procure a certificate of title under the said statute within six months from the day of sale, the purchaser shall be at liberty to reject the title, and thereupon his deposit of £300 shall be returned to him."

The contract was made on the 5th June, 1888. On the 16th June, 1888, the defendant's solicitors sent to the plaintiff's solicitors requisitions on title. The answers to the requisitions were made on the 28th June. The defendant's solicitors did not consider these an-

swers satisfactory, and required that the land should be brought under the "Transfer of Land Statute." Negotiations were then entered into between the parties to complete the matter without bringing the land under the statute; but, owing to a misunderstanding, these fell through on the 20th July; and the plaintiff then took steps to bring the land under the "Transfer of Land Statute." The certificate of title was not, however, issued till 20th December. In the meantime, as the certificate of title had not been procured, the defendant's solicitors wrote to plaintiff's solicitors informing them that as the certificate had not been procured within the six months allowed by the contract, the defendant rejected the title and claimed the return of the deposit and interest. There had been a conversation on the 5th December between a clerk of the plaintiff's solicitors and a clerk of the defendant's solicitors as to when the title would be ready. All the preliminaries for obtaining the certificate of title had then been complied with by the plaintiff, the Examiner of Titles had approved of the application on that day, and on the same day the Commissioner [*426] of Titles assented to the application, but the certificate was not issued until the 20th December. This action was now brought for specific performance of the contract. The defendant contended that the plaintiff was not entitled to have the contract carried out, and made a counter-claim for the return of the £300 deposit and interest.

Neighbour for the plaintiff.

Weigall & Hayes for the defendant.

Neighbour opened the plaintiff's case:—By the conditions of sale, if the purchaser was not satisfied with the vendor's title, the latter might bring the land under the "Transfer of Land Statute," and within two days after acceptance of title, the purchaser was to pay the balance of the purchase money. The defendant contends that, under the conditions, if he did not accept the vendor's title within fourteen days, the vendor had "forthwith" to bring the land under the "Transfer of Land Statute," and that he did not forthwith proceed to

do so in this case. No doubt that is so, but the reason of it was that negotiations had been entered into between the parties with the object of arriving at a settlement without the necessity of bringing the land under the Act, and were continued for some time after the purchaser required the vendor to bring the land under the Act. After they ultimately fell through on the 20th July, the vendor used all reasonable despatch to bring the land under the statute; but, owing to the length of time necessary to get the application through the Titles Office, and the amount of time that had been lost by the negotiations having been entered into between the parties, the vendor was unable within the six months to bring the land under the statute. His application was, however, practically granted within that time, although no certificate had been issued. Under the circumstances the question will arise whether the defendant has not waived the right to treat the six months within which the certificate was to be obtained as of the essence of the contract.

Weigall :—The question of waiver is not pleaded, and we therefore object to its being gone into.

[*427] Neighbour :—Then I ask for an amendment of the plaintiff's statement of claim by alleging waiver.

[Hodges, J.—What have you to say to this application, Mr. Weigall ?]

Weigall :—All the facts were within the plaintiff's knowledge, and he started his case, entirely basing it on his alleged performance of all conditions precedent. We go to trial upon that, and it is submitted that at this stage of the case it is too late now to ask for an amendment in order to make an entirely new case by alleging that it was not necessary that the conditions precedent should be performed, or that the performance of the unperformed conditions was waived: White v. The Derwent & Tamar Fire and Marine Assurance Co.[1]

[1] 10 A. L. T. 145.

[Hodges, J.—I was in that case, and it was held that there it was a departure. In this case I do not think it would be a departure. I think the amendment ought to be allowed. Of course, if the defendant is not ready to go on, the case will have to be adjourned.]

It will be necessary to plead to the amended statement of claim.

[Hodges, J.—Well, I will allow the amendment and adjourn the case, the plaintiff to pay the costs of the day.]

The statement of claim having been so amended, and the defence denying the alleged waiver, the case again came on.

Neighbour :—The negotiations entered into between the parties were such as to lead the vendor to think that he was not at present required to bring the land under the statute, and it is submitted that they amounted to a waiver by the defendant of his right to insist upon that being done within the six months. As a matter of fact the Examiner of Titles had, by the 5th December, approved of the defendant's application to bring the land under the Act, and on the same day the Commissioner of Titles assented to it; although it was not till the 20th December that the certificate of title was actually issued.

[*428] [Hodges, J.—The contract says that the vendor shall "procure" a certificate of title within six months. Can it be said to be "procured" if not actually in existence.]

The thing was substantially done when the commissioner assented to it—the rest was merely formal. It is submitted that apart from the question of waiver that is a compliance with the contract. If the whole of the conditions be read together it will be seen that the parties did not intend that a sharp and well-defined line should be drawn at six months. The second condition says that the vendor shall "forthwith" lodge an application to bring the land under the Act, and "use his best endeavors" to get a certificate of title, and then goes on to

say that if he fails to get a certificate within six months the purchaser may rescind the contract. It is submitted that that does not make the six months of the essence of the contract, that it would not have been sufficient to entitle the purchaser to rescind if the vendor was a single day or even a single hour late. And even if it did, the vendor was entitled to a notice before the expiration of the six months that the purchaser would rescind if the certificate was not produced before that time. I shall prove that the plaintiff, after the falling through of negotiations between the parties, used his best endeavours to procure a certificate within the six months.

Evidence for the plaintiff was then called, and the plaintiff's case was closed.

Weigall, for the defendant, then submitted that the plaintiff had made no case, and that the defendant was entitled to judgment. It is submitted that time is of the essence of the contract. The parties clearly intended that it should be so, for, in addition to fixing a particular time, they provided that, if, at that particular time, a certificate of title has not been procured, the purchaser may rescind.

[Hodges, J.—Mr. Neighbour has proved the facts he opened. I was waiting at the close of his opening expecting you to ask for a direction.]

[*429] There could be no waiver before the time had expired.

[Hodges, J.—So I should have thought, but you do not plead that in your amended pleading, and the rules require that a matter of law should be pleaded. The plaintiff alleges that the defendant did so and so, and that that was a waiver ; and the defendant only denies that he did so, and does not say that, even if he did do it, it was no waiver.]

It is wrongly called a waiver. The plaintiff states the facts which show it is only a question of extended time which he relies on. It is submitted that the defen-

dant is not called upon to go into evidence, but is entitled to judgment for a return of the £300 deposit and interest at six per cent. per annum for all the time the plaintiff had it, or, at all events, after the title was rejected.

[Hodges, J.—What authority have you for claiming interest. The only way in which you can claim it is as damages for breach of contract.]

This is a breach of contract, and the defendant is therefore entitled to interest: Weston v. Savage ;[2] Lord Anson v. Hodges.[3]

[Hodges, J.—In the latter case the vendor undertook to give the title and did not do so. Here he has the title, and wishes to give it.]

At all events the defendant is entitled to a return of the deposit and costs of action.

Neighbour for the plaintiff :—If the parties had agreed after entering into the contract that the vendor need not proceed to bring the land under the Act within the six months, it could not be said that that did not amount to a waiver of the right to consider time of the essence of the contract ; and that, it is submitted, is what in effect has been done in this case ; the negotiations show, at all events, an implied agreement to that effect.

[Hodges, J.—Waiving notice of dishonour of a bill of exchange must take place after the notice of dishonour. Before the notice of dishonour you can, however, give an extended time. The [*430] object of the negotiations here was simply to settle up the matter, though incidentally to that, if the parties had agreed, was the abandonment of the bringing of the land under the statute ; but how does that make it a waiver of your duty to get the title within six months ?]

If, as in this case, a vendor enter into negotiations which produce delay with regard to a matter which a

[2] 10 Ch. D. 736.
[3] 5 Sim. 227.

purchaser has undertaken to do by a certain time, it amounts, if not to a waiver, to an extension of the time within which the act is to be done; and, as the facts are set out in the statement of claim, I am entitled to regard it as raising that point.

[Hodges, J.—Can you show me any authority that where a party has by contract in writing undertaken to do a certain act by a particular day, he can by verbal agreement with the other contracting party vary that contract by dispensing with the doing of that act or by extending the time within which it is to be done?]

Yes: the conduct of parties before completion may amount to a waiver: Hipwell v. Knight;[4] so, too, waiver of time for delivering an abstract of title may amount to a waiver of the time fixed for completion: 1 Dart. V. & P. (6th Ed.), 490-1. It is submitted that the condition means that if within fourteen days the purchaser shall have refused to accept title—shall have inspected title and made requisitions thereon, and on the answers to those requisitions being made, has elected not to accept title—then the purchaser shall proceed "forthwith" to lodge an application to bring the land under the statute. The time for lodging the application to bring the land under the statute has therefore been waived, and it is submitted that the purchaser is entitled to six months to do so from 20th July: Barclay v. Messenger.[5] Time is not of the essence of the contract, and a reasonable time and notice must be allowed: Parkin v. Thorold;[6] Perry v. Sherlock.[7]

[Hodges, J.—I do not see what the vendor has done inconsistent with his claiming that the certificate of title should be procured within six months.]

[*431] The agreement was that there should be fourteen days for inspection of title, requisitioning, and so on, and a further period of six months for procuring the

[4] 4 L. T. (N. S.) Exch. in Eq. 52.
[5] 43 L. J. Ch. 449.
[6] 16 Beav. 59.
[7] 14 V. L. R. 492.

certificate. The vendor has by entering into negotiations extended the fourteen days, and thereby it is submitted correspondingly extended the time for bringing the land under the Act; if not, the purchaser has not six months to procure the certificate, and both parties regard that as a reasonable time.

Weigall, in reply, was only called upon on the question of costs.

[Hodges, J.—On the 5th December the certificate was practically ready, and the contract would have been completed had it not been for the breaking up of the land market. It is a case of a person having no merits availing himself of a legal right.]

He has taken that legal point throughout; the plaintiff knew from the outset he had to meet it, and still chose to fight it. The defendant has succeeded upon it on a nonsuit application.

[Hodges, J.—If you wish to give evidence bearing on the question of costs I will hear it.]

Evidence for the defendant on this point was then called.

Weigall then summed up on the question of costs.

Neighbour, in reply on the question of costs, was not called upon.

Hodges, J.—In this case the plaintiff seeks specific performance of an agreement, dated the 5th June, 1888, by which the plaintiff sold to the defendant, and the defendant bought from the plaintiff, certain land. According to a condition of the sale, described as the third condition, it is provided that if the vendor fails to procure a certificate of title under the "Transfer of Land Statute" within six months from the day of sale, the purchaser shall be at liberty to reject the title, and thereupon his deposit of £300 shall be restored to him. After the contract had been made the parties were under the first condition endeavouring to see whether or not the matter [*432] could be closed without reference to the Office of Titles and obtaining a certificate of title. The defendant ultimately refused to accept the title. After

he had so refused negotiations were still continued on another basis until 20th July, 1888, when they were finally concluded. The first condition provided that if the purchaser failed to accept the vendor's title within fourteen days the balance of purchase money should be payable within two days of production of certificate of title clear of encumbrances in the vendor's name.

The plaintiff puts his case in three ways. First, that time under the third condition was not of the essence of the contract; secondly, that even if time were of the essence of the contract under the third condition, it was waived by the conduct of the defendant, and that the conduct of the defendant was such as to make it impossible for the plaintiff to get a certificate of title within the six months; and thirdly, that the defendant by his conduct did not leave the plaintiff a reasonable time to get the certificate of title within six months. In my opinion, time is under the third condition—I say nothing about the others—of the essence of the contract. The first condition provides that one party is to accept the title within fourteen days, and if it is not accepted in that time, then the vendor shall have the right to bring the land under the operation of the "Transfer of Land Statute," and he is to do it immediately on the expiration of the fourteen days. I think that shows that it was the duty of the vendor to take steps immediately on the refusal to accept title to get a certificate of title as soon as he could; and the defendant was to pay the purchase money within two days after production of the certificate. And then under the third condition—I take it that is what it means—the time for procuring the certificate of title was not to exceed six months, and if it did the defendant could rescind. I take it that that makes time of the essence of the contract on the authority of Hipwell v. Knight[8] and Barclay v. Messenger.[9] That being so, the plaintiff cannot succeed in enforcing specific performance of the contract unless he can show that the condition has been waived. There is

[8] 4 L. J. (N. S.) Exch. in Eq. 52.
[9] 48 L. J. Ch. 449.

no evidence sufficient to satisfy me that the condition has been waived. In my opinion, an act to amount to a waiver [*433] must be one which is inconsistent with the idea that the party is still going to rely on the condition. If his act is consistent with his still relying on the condition, it is not a waiver. If it is inconsistent with his relying on the condition, it may be a waiver. I cannot see on the evidence in this case that these negotiations extending up to the 20th July are inconsistent with the defendant, when the six months expired, insisting on his right to reject the title, and claim back the money paid, and on the time fixed by this third condition as being of the essence of the contract. There is no evidence that the defendant did not intend to rely on the condition that the certificate of title was to be procured in six months, or that the defendant had done anything to make it impossible for the plaintiff to procure the certificate in the six months, or that he was not left a reasonable time in which to procure it. It certainly was not impossible, and it seems to me he was left a reasonable time within which to do it. It was put for the plaintiff that the certificate was procured as the title had been accepted by tne Titles Office ; but I take it that to be "procured" it must be in existence. Therefore, on these grounds I think the plaintiff fails, and that the defendant was justified in rescinding the contract and claiming the return of the deposit, as he did by letter of 18th December. The judgment will therefore be against the plaintiff on the claim, and for the defendant on the counter-claim for £300 and interest at 6 per cent. from the 18th December.

The only remaining question is that of costs. I shall give no costs to either party on this ground : that there certainly were negotiations which might have terminated without any application to bring the land under the "Transfer of Land Statute." These negotiations went on up to the 2nd July—considerably beyond the fourteen days mentioned in the contract, but were then finally settled by one telling the other to bring the land under the Act. The application was ready and sub-

stantially completed within the time required by the contract. I have not the slightest doubt that if the defendant had wanted the land, and if the circumstances had continued in December as they were when the contract was made, there would have been no difficulty whatever, because, undoubtedly, the defendant could have dealt with the land on the 5th December pretty much as if he had the title in his own hands, for although there [*434] may be possibilities, we have to deal with things likely to occur in actual life. I can see no reason for a person in the defendant's position not dealing with this land on the 5th December as if the certificate had been issued; and, although he was acting within his strict legal rights in getting out of the contract, I do not think I am therefore bound to give him his costs; and, although counsel may have advised that he has a legal right, it does not follow that in every case because a person has a legal right to do a thing he will get the costs of litigating it. There are at the present time an enormous number of cases of persons who, having made contracts, are endeavouring to get out of them on their strict legal rights, and although they may succeed in enforcing those strict legal rights, I do not think they are entitled to the consideration of the Court.

Judgment for the defendant on the claim without costs, and for the defendant on the counter-claim for £300 and interest from 18th December, at six per cent. per annum without costs.

Solicitors for plaintiff:—Pentland, Roberts & Thompson.

Solicitors for defendant:—Duffett & Prown.

IN CHAMBERS, VICTORIA.—KERFERD, J.] [8 A. L. T. 181.

EX PARTE GOLDSWORTHY.

"Transfer of Land Statute, 1866" (No. 301), sec. 117—Judicature Act, 1883 (No. 761), sec. 10 (7)—Removal of caveat—Procedure—Want of jurisdiction—Costs—Where a Judge has absolutely no jurisdiction to entertain an application made to him, the rule "no jurisdiction no costs" must prevail.

Application on summons under Sec. 117 of the "Transfer of Land Statute, 1866," on behalf of the proprietor, calling upon the caveator to show cause why the caveat should not be removed.

Mr. Amess, on behalf of the caveator :—Your Honour cannot entertain this application. The procedure in cases of this kind has been settled by the Full Court in the case of Ex parte Vincent, 8 A. L. T. 5, where it is laid down that "where a party seeks to remove a caveat the proper course to adopt is to obtain a summons from a Judge in Chambers, returnable before the Full Court, calling upon the caveator to show cause why the caveat should not be removed." I therefore ask that this summons should be dismissed with costs."

His Honour :—I dismiss the summons, but, as I have no jurisdiction, without costs.

Mr. Amess cited Hamilton on the Judicature Act, p. 455, as showing that costs could be given although there was no jurisdiction [*182] to entertain the matter.

His Honour :—I will reserve the question of costs.

His Honour, on a subsequent day, said :—In this case I reserved my decision as to whether I had power to give costs. At p. 455 of Mr. Hamilton's work on the Judicature Act the law on the subject is stated as follows :—"Formerly where an application was made upon which the Court had no jurisdiction to adjudicate no costs were given, and each person had to bear his own costs. That, however, has been altered, and the Court

now has power to order the payment of costs in such cases." Several authorities for this proposition are cited, which I have examined, but they do not appear to support the conclusion reached by the learned author. In all of them the Court had jurisdiction to entertain the respective matters if they had been properly brought under its notice ; but in this case I have, as laid down by the Full Court, an absolute want of jurisdiction to entertain the matter at all. In such a case the old rule, "no jurisdiction no costs," must prevail. I therefore make no order as to costs.

Solicitors for proprietor:—McKean & Leonard.

Solicitor for caveator:—Birtwistle.

SUPREME COURT, VICTORIA.] [13 A. L. T. 270.

IN RE THE CAVEATS OF TALBOT AND KELLY.

Caveat—"Transfer of Land Act, 1890," sec. 145.

An application by a registered proprietor for the removal of a caveat on the ground that it interfered with some future intended dealings with the land will not be entertained by the Court when it is admitted or shown that the caveat has been lodged in accordance with the Act and by a person entitled to lodge it.

In such a case the registered proprietor, in order to obtain the removal of, or in order to test the right of the caveator to lodge, the caveat must proceed in accordance with the provisions of section 145 of the "Transfer of Land Act, 1890."

This was a summons under Sec. 145 of the "Transfer of Land Act, 1890," by the registered proprietor of a certain mineral lease, calling upon the caveators to show cause why two caveats lodged by them should not be removed. Some time in 1891, several persons, including the applicants and the caveator in the present proceedings, banded themselves together into a syndicate called the "Boga Syndicate," for the purpose of obtaining a mineral lease of some land containing gypsum deposits, and it was agreed that when the lease was obtained it should be transferred to some company to be formed, according to the votes of the majority of the syndicate. The lease was duly applied for by two mem-

bers of the syndicate, Tutton and Inman, was granted and was registered in their names, and they executed a declaration of trust in which they stated that they held the lease for the syndicate, and that they should transfer it subject to the votes of the majority of the syndicate. Two of the members of the syndicate, Kelly and Talbot, then lodged the caveats which it was now sought to remove.

Mr. Hayes in support of the summons :—This is a summons under Sec. 145 of the "Transfer of Land Act" by the registered proprietors, Mr. Tutton and Mr. Inman, of certain mineral leases containing gypsum deposits, seeking to remove the caveats lodged by the caveators, Messrs. Talbot and Kelly, who claim to be beneficially interested in the lease. We say that by the agreement under which the caveators claim it was agreed that these leases should be applied for and held by Tutton and Inman, and that such lease should be transferred to a company to be formed according to the votes of the majority of the syndicate, which consisted of the registered proprietors, the caveators and five other persons, who had banded themselves together for the purpose of obtaining this lease. [a'Beckett, J.—There is no transfer stopped by these caveats, and it appears to me that the object of this summons is to get this Court to settle a partnership suit, but does the Act contemplate such a proceeding as that?] The bona fide object of this summons is to have the caveats removed. We do not say that we wish to deal with this land against the caveators' interests, but what we do say is that their caveats are too broad, and if they would modify their caveats to include only their own interest, that is all we would ask. Seven out of the syndicate of nine desire to have their caveats removed and a transfer of the lease made to the company. The caveators' interests arise solely out of the agreement or declaration of trust, and as the sole object in view when this lease was applied for was to float a company to work the lease, the caveators, I submit, had no right to lodge the caveats, the result of which is to stifle that very object. We do not object

to a caveat being lodged to protect the caveators' rights under the agreement, viz., against any transfer except such transfer as the majority of the members of the syndicate shall require to be made.

Mr. Weigall to oppose the summons :—It is admitted that the caveators are two cestui que trusts, and that they have lodged caveats against all dealings with the land contrary to their interests. They say "if we are parties to the instrument then it is all right ; [*271] but if we are not parties, then these caveats are a warning to all persons who deal with the registered proprietors." The only way they could protect themselves was to lodge these caveats. The effect of lodging these caveats is that if the registered proprietors lodge a transfer of the land the caveators will get notice, and then they can go and support their caveats ; or if they don't the caveats will lapse. The present application is premature, and nothing has as yet been done which casts any duty upon the caveators to support or withdraw their caveats. No transfer, nor has any registration abstract been lodged, and the registered proprietors cannot apply to get rid of a caveat merely because it will embarrass some future contemplated dealing with the land.

Mr. Hayes :—The Court will look into all the circumstances of the case and see whether the caveators were justified in lodging the caveats. In the present case, though the caveators have an interest in the lease, they had no right to lodge caveats when the object and result of the caveats is to defeat the very object for which the syndicate was banded together. Sec. 147 of the "Transfer of Land Act" says "reasonable cause," therefore the Court must consider the facts. The form of the caveats is improper. [Higinbotham, C.J.—Has this Court any power to prescribe the form of caveat, seeing that the caveators have adopted one of the forms permitted by the Act, though a form more consistent with the rights of all the parties might have been chosen?] The caveators had no right to lodge caveats absolutely forbidding a transfer, and they should have chosen one of the modes

most suitable to the particular facts of the cases. [Higinbotham, C.J.—Can you raise disputed questions of fact on an application of this kind?] I think that the Act contemplates that the Court will look into the facts.

Higinbotham, C.J.—These two cases must, we think, be determined without considering in any way the disputed facts raised by affidavits. It is admitted that these two caveators are beneficiaries, and that they claim an interest in the land, and they have each of them filed a caveat which is in the form allowed by the Act, viz., "unless the same be subject to my said claim or unless I am a party to the instrument." The intention of the Act was that when a caveator lodges a caveat in accordance with the forms of the Act it lies upon the registered proprietor to get that caveat removed in the way appointed by the Act. So long as he does not wish to transfer, no wrong is done; but if he wishes to transfer, notice of such intention is conveyed to the caveator, and the caveat will lapse unless the caveator takes steps to support his claim.

That is the course that ought to be taken by the present applicants, and they should not seek to remove caveats which have been lodged in accordance with the Act and by persons entitled to lodge them. The applicants have taken the wrong course in the present case, and this summons must be dismissed with costs.

Solicitors for the applicants:—Lynch, McDonald, Stillman & Keep.

Solicitor for the caveators:—Talbot.

VICTORIA.—WILLIAMS, J.] [6 A. L. T. 85.

RE O'CONNELL AND "THE TRANSFER OF LAND STATUTE."

Mandamus—"Transfer of Land Statute, 1866" (No. 301), sec. 132—Circumstances under which the Court will grant a mandamus calling on the Registrar of Titles to call in a certificate of title, or to give the reason for not doing so.

Rule nisi for a mandamus calling on the Registrar of Titles to show cause why he should not give his reasons

for refusing to call in a certificate of title granted to one O'Connell for some land at Footscray, or why he should not call in the certificate. In 1861 a person named Merrick owned some land at Footscray. He died in April of that year. By his will he devised the property to his wife. In December of the same year Mrs. Merrick conveyed to Messrs. Hodgson and others the "unsold land" that her husband had owned at Footscray. That conveyance was registered. The land was afterwards conveyed to other persons, the different allotments being specified in the several conveyances. Amongst others was one known as allotment 20, which had come into possession of an investment society. That society lately desired to deal with allotment 20, but then discovered that a certificate of title to it had been granted to O'Connell. It appeared that in April, 1854, Merrick had entered into a contract to sell this land to a person named McCarthy. This contract was, however, not registered till the 17th July, 1874, and immediately afterwards a transfer by McCarthy to O'Connell was given, and the latter received a certificate of title, which the registrar had since refused to call in, and he has refused to give any reasons for his refusal.

Mr. Higgins moved the rule absolute; Mr. Worthington showed cause.

It was contended for the registrar that the application should not be granted. Sec. 132 of the "Transfer of Land Statute" provided that in case it shall appear to the satisfaction of the registrar that any certificate of title has been issued in error, or contains any misdescription of the land or boundaries, or that any entry or endorsement has been made in error, or that any certificate has been fraudulently or wrongfully obtained, the registrar might apply to have the certificate called in. In this case the registrar was not satisfied that the case came within any of these provisions.

His Honour said that he should refuse the application, as it was not proved to him that it appeared to the

satisfaction of the registrar that the certificate had been issued in error, or contained a misdescription of the land, or had been fraudulently or wrongfully obtained.

Rule for a mandamus discharged, with costs.

SUPREME COURT, VICTORIA, 1884.] [10 V. L. R. 328.

IN RE "THE TRANSFER OF LAND STATUTE," EX PARTE PECK.

15 Vic. No. 10, sec. 19—"The Judicature Act, 1883" (No. 761), secs. 10, 19—Supreme Court Rules, 1884, Ord. 63, R. 2—Practice—Ex parte application.*

Rule 2* of Order 63 of the Supreme Court Rules, 1884, enables a single Judge at any time to entertain any application which he may think requires to be immediately or promptly heard, though the matter concerned be such as should, apart from the Rule, be heard by the Full Court alone.

An application to restrain the Registrar of Titles from registering a transfer of land for a time to be fixed should be made upon notice, and not *ex parte*.

Summons referred to the Full Court by Higinbotham, J. This was a summons on behalf of Hugh Peck, the caveator, under Sec. 117 of the "Transfer of Land Statute" (No. 301) to [*329] the Registrar of Titles to delay dealing with a transfer of land at Nunawading, mortgaged to the Land Mortgage Bank by Peck, there being a dispute between him and the bank as to the amount due upon the mortgage. The summons came on in the first instance before Higinbotham, J., in Chambers, within fourteen days after notice to the caveator of a proposed dealing with the land, and at a time when the Full Court was not sitting. The learned Judge granted an order to delay further dealings with the land; but, feeling some doubt whether Sec. 10 (7) of "The Judicature Act, 1883" (No. 761), did not render it necessary that the Full Court alone should deal with such applications, referred the summons to the Full Court, in order that the question might be there decided.

Neighbour, for the caveator, applied ex parte for an order to delay registration of any dealing with the land for such period as might be fixed.

Per Curiam.[1] It is better that an application of this character should not be made ex parte, but by motion upon notice, as required by Order 52, Rule 3, of "The Rules of the Supreme Court, 1884."

Box, for the caveator, now moved upon notice :—The matter was one which the learned judge had jurisdiction to entertain. Sec. 10, Sub.-sec. 7, of "The Judicature Act, 1883" (No. 761), provides that the Full Court shall hear and determine "all proceedings upon or connected with caveats under the 'Transfer of Land Statute.'" But it is questionable whether this provision was intended to apply to an application such as the present under Sec. 117 of the Act. It is not necessary, however, to press this distinction, because Sec. 19 of "The Judicature Act, 1883" (No. 761), has given a power which has been exercised in rule 2* of Order 63 of "The Rules of the Supreme Court, 1884."[2] That rule, which was intended to replace what was known as the [*330] emergency clause, Sec. 19 of the Act 15 Vic. No. 10, by its terms, enables a Judge sitting as the Court in cases of emergency to deal with matters otherwise cognisable by the Full Court alone. If this be not its effect great inconvenience and possible injustice might result through the Full Court, as in the present case, not being available. The merits of the application are not attacked.

a'Beckett, for the registered proprietor, the Land Mortgage Bank :—This is not a matter which could properly be entertained by a single Judge. There is no escape from the terms of Sub.-sec. 7 of Sec. 10 of "The Judicature Act, 1883." It cannot be said that this proceeding, directed by Sec. 117 of the "Transfer of Land

[1] Higinbotham, Williams and Holroyd, JJ.

[2] "2*. One of the Judges of the Court shall be accessible for the hearing in Melbourne at all times, of all such applications as may require to be immediately or promptly heard."

Statute" as the proper step to be taken by a caveator, is not a proceeding "upon or connected with" a caveat. Therefore the caveator, not having taken the proper steps within the time prescribed by Sec. 117, is now too late, and his caveat has lapsed.

Rule 2* of Order 63 has not the effect contended for, so as to enable a single Judge at any time to do a thing which only the Full Court is, apart from this rule, enabled to do. Whatever be the intention of Sec. 19 of "The Judicature Act, 1883," the rule in question is not so framed as to have this extraordinary effect. The words of the rule are "shall be accessible at all times." If it had been intended that a single Judge should be able to exercise the powers of the Full Court, it would have been so expressed. The power being given "at all times" is equally available when the Full Court is actually sitting; and thus, if the view taken by the caveator be correct, one Judge might at any time, and during the sittings of the Full Court, do that which the Act expressly provides shall be done by the Full Court alone.

Higinbotham, J.—I am glad, after fuller consideration of the question, to be of opinion that in entertaining this application I did not exceed my jurisdiction, a point upon which I had at one time great doubts. I am now of opinion that Sec. 19 of "The Judicature Act, 1883" (No. 761), was intended to take the place of Sec. 19 of the Act 15 Vic. No. 10, by enabling Rules of Court to be made by which a Judge of the Court should be empowered [*331] to entertain all applications whatsoever, whether within his jurisdiction as a Judge of this Court or not, provided such application were such as might require to be immediately or promptly heard. On this view of Sec. 19 provision is made for all cases of urgency, and the possibility of injustice seems to be guarded against by the provision allowing an appeal at all times to be made, similar to that provided in Sec. 19 of 15 Vic. No. 10. If this be the extent of the section, then Rule 2* of Order 63 (though not perhaps framed as accurately as might be desired) includes a case not otherwise within the jurisdiction of a single Judge. It might have been

more suitable if the rule had been limited to those periods at which the Full Court was not sitting ; but there can be no doubt that if any application were made under the rule during a sitting of the Full Court, a Judge would be very reluctant to exercise a jurisdiction which the rule gives merely with the object of preventing possible injury or injustice by reason of the Full Court not being available. Being of opinion that the larger construction of Sec. 19, which I adopt, enables such a rule to be made, I think that this rule gives power to any Judge, at any time when he is accessible, to deal with any such applications as he may consider should be immediately or promptly heard, and that this Court has jurisdiction now to entertain this matter.

The registrar will be directed to delay registering any dealing with the land for a period of one month, the caveator paying into Court £100 within five days as an indemnity against any damage that may be sustained by reason of the disposition of the property being delayed.

Williams and Holroyd, JJ., concurred.

Attorney for the caveator :—Bardwell.

Attorneys for the proprietor :—Macgregor & Brahe.

SUPREME COURT, VICTORIA.] [4 A. L. T. 151.

BEATH v. ANDERSON.

"Transfer of Land Statute" (No. 301), sec. 106—Sale by sheriff of land under two writs—Right of judgment creditors to purchase money regulated by priority of lodging writ with sheriff irrespective of compliance with the provisions of this section.

This was a special case stated by consent of parties for the opinion of the Court. The defendant, Mr. Anderson, was the sheriff of the Southern Bailiwick, and the plaintiffs were Messrs. Beath, Schiess & Co. The case was stated to ascertain whether the plaintiffs were entitled in priority to payment of a sum of £44 6s. 10d., levied on certain goods of a person named Josiah Bean, under a writ of fi. fa. issued to the sheriff. It appeared

from the case that on the 28th September, 1880, the plaintiffs obtained a writ of fi. fa. against Bean, which was sent to the sheriff on the 30th September to be executed. A sum was paid on the writ, leaving a balance of £44 6s. 10d. due. Nothing further was done in regard to executing the writ till July, 1882. In June, 1882, a Mrs. Warburton issued execution against Bean for £220, and notice of the issue of this writ was given to the Registrar of Titles in pursuance of Sec. 106 of the "Transfer of Land Statute," so as to bind any lands belonging to Bean. The writ was also given to the sheriff. On the 6th July certain land and leasehold property of Bean were sold by the sheriff; the leasehold realised about £2, and the land about £71. The plaintiffs afterwards served a notice on the Registrar of Titles of the issue of their execution. The question was whether the plaintiffs, having issued execution before Mrs. Warburton, could claim payment of their debt in priority to her, or whether, as she had first given notice to the Registrar of Titles that she had issued a writ of fi. fa. against Bean, the sheriff was not bound to pay her first. It was stated that the sheriff sold under both writs. It was contended for the defendant that by Sec. 106 of the "Transfer of Land Statute," the writ that was first served on the Registrar of Titles had priority. That section provided that no execution registered prior to or after the commencement of this Act shall bind, charge, or affect any land or any lease; but the registrar, on being served with a copy of any writ of fi. fa. issued out of the Supreme Court, shall enter the same in the register book, and after the land shall have been sold under such writ, the registrar shall enter the transfer in the register book. It was contended for the plaintiffs that that section had nothing to do with the duties of the sheriff, but was only a matter of conveyancing, and that the law still remained in force, that the sheriff must pay the creditors according to the time when the different writs were lodged with him.

Mr. Hodges for plaintiffs; Mr. a'Beckett and Mr. Anderson for defendant.

The Court held that the plaintiffs were entitled to be paid their debt in priority to Mrs. Warburton, and gave judgment for the plaintiffs.

VICTORIA.—MOLESWORTH, J.] [4 A. L. T. 37

KICKHAM v. THE QUEEN.

The purchaser at a sheriff's sale of a lease under the Lands Act, 1869, is entitled, on payment of overdue rent before entry by the Crown for non-payment, to obtain an injunction restraining the Crown from proceeding for a forfeiture.

This was a petition by Lawrence Kickham seeking to restrain the sale of certain land in the parish of Kanyapella. In June, 1876, one Wm. Barnesley obtained a lease of the land from the Crown, under the Land Act, 1869, for seven years. Barnesley was sued by certain creditors in 1878; execution was issued against him, and in June, 1879, the sheriff sold the land by public auction for £11 to Lawrence Kickham. The transfer from the sheriff to Kickham was duly lodged at the Titles Office. Kickham went into possession, and Barnesley attorned to him as his tenant. One J. D. Bertram had, on 2nd April, 1879, lodged a caveat against any dealings with the land, claiming that an equitable mortgage over the land had been given to him by Barnesley. This caveat was not prosecuted. The registrar, however, refused to register the transfer from the sheriff to the plaintiff. Owing to the difficulty in obtaining a title, the plaintiff did not pay the rent to the Crown, and in June, 1880, the land board recommended that the lease be forfeited. The plaintiff, hearing of this, inquired at the Echuca office, and ascertained that there was £12 4s. due for rent; this sum he tendered, but the officer refused to receive it, and the plaintiff, therefore, instituted this suit to prevent the forfeiture being carried into effect. On an application in February last, for an interlocutory injunction, Mr. Justice Molesworth held that the plain-

tiff could by tender of the rent prevent the forfeiture, and granted the injunction (3 A. L. T. 86). The case was afterwards set down for evidence, but no additional material facts were elicited, and the case came on for hearing.

Mr. Moore and Mr. Topp, for plaintiff; Mr. Worthington, for the Crown.

His Honour, without calling on plaintiff's counsel to reply, said that he apprehended that by the law of the country a leasehold was liable to be sold under a writ of fi. fa. It was legally set up for sale, and legally sold to the plaintiff. He had already intimated that the "Transfer of Land Act" had nothing to do with rights, but subjected an unregistered person to be defeated by conveyances, if registered. But otherwise, a sale under it was the same as under the ordinary law. The present plaintiff became an assignee of the tenant's right to tender the rent. The Crown was entitled to the rent, and it was immaterial who paid it. Whether plaintiff was the registered assignee of the lease or not, the Crown had a perfect and unimpaired right to the rent. So also as to the covenants in the lease. If they were broken the Crown might terminate the lease, no matter to whom the lease might belong. He thought the plaintiff was entitled to a declaration that his tender of the rent prevented a forfeiture. He therefore declared that the tender of rent in the petition mentioned saved the leasehold interest therein mentioned from being liable to forfeiture for non-payment thereof. Provided plaintiff paid the said rent to the proper officer, or tendered the same, the injunction already granted to be continued; plaintiff to be entitled to his costs of the suit.

Solicitor for the petitioner:—Colles.

Solicitor for the Crown:—Sutherland, Crown Solicitor.

the benefit of the estate, and the next-of-kin have had the benefit of it, and cannot now come in and claim to have it set aside. The defendant, Martha Wilson was the beneficiary to the extent of one-half of the estate, and, for all the defendant Alger may have known, she might have had the consent of all the other beneficiaries, or she may have been the only next-of-kin ; and if it can be shown that any state of circumstances may have existed which would negative the presumption of knowledge which the plaintiff avers should be drawn from the facts, that will dispose of such presumption. The defendant Alger was dealing with the registered proprietor under the "Transfer of Land Act," and unless fraud is shown his title cannot be defeated: "Transfer of Land Act, 1890," Secs. 74, 140. The plaintiff did not prove any fraud, either actual or constructive, and though the defendant Alger was put in the box and tendered for cross-examination, he was not asked a single question with a view to impugning his honesty in the transaction. Even assuming, however, that there was a constructive fraud, that is not sufficient; the fraud contemplated by the Act is actual fraud: Robertson v. Keith, 1 V. R. (Eq.) 11 ; Colechin v. Wade, 3 V. L. R. (Eq.) 266, at p. 269. The decision of Molesworth, J., in Chomley v. Firebrace, 5 V. L. R. (Eq.) 57, is in favour of the defendant, and though that case was overruled on appeal the reasons of the learned primary Judge were not affected thereby. See also a'Beckett's Transfer of Land Statute, p. 111, note (e) to Sec. 50 ; Crow v. Campbell, 10 V. L. R. (Eq.) 186, and in Droop v. Colonial Bank, 7 V. L. R. (Eq.) at pp. 75, 77 and 78. Stephen, J., shows that if this case had gone on to a conclusion in the Court below the decision of Molesworth, J., would not have been upset. A low moral perception even does not amount to fraud: Lake v. Jones, 15 V. L. R. 728 ; Cullen v. Thompson, 5 V. L. R. (Eq.) 147, at p. 153. The argument up to this point has dealt with this case as if it had been an actual transfer and not a mortgage; but a mortgagee under the Act is in a stronger position than a purchaser, inasmuch as Secs. 113, 114, and 124 of the Act which deals with

mortgages do not contain any exceptions at all, even in the case of fraud. Further, Sec. 138 of the Act gives an administratrix who is registered under the Act absolute power to deal with the land as she pleases. In any event the defendant Alger is entitled to hold this mortgage to the extent of the administratrix's interest in the land: Brew v. Jones, 2 V. R. (Eq.) 20 ; Bentley v. Bates, 4 Y. and Col. 182, at pp. 191 and 192.

Mr. Isaacs in reply.

Cur. adv. vult.

June 5th.

a'Beckett, J., dissentient :—This is an action by one of the next-of-kin of an intestate to set aside a mortgage by the administratrix of land held under the "Transfer of Land Statute." The ground on which the statement of claim asks that it shall be set aside, is that it was made to secure the personal liability of the administratrix for her own debt, and was not given for any debt owing by her as administratrix, and that the defendant was well aware of this. The defence alleges that the debt to the defendant arose by reason of a purchase from him by the administratrix made on behalf of herself and the other next-of-kin, including the plaintiff. That the plaintiff knew and approved of the purchase, and had taken the benefit of it, and was therefore estopped from bringing the action. The defendant further relies on the "Transfer of Land Statute" as validating his title, notwithstanding the facts alleged in the statement of claim. At the trial the defendant did not attempt to prove any of the facts alleged by him as constituting an estoppel. The only facts proved or admitted were that the intestate having died in March, 1888, administration was granted to his widow in August of the same year. That she mortgaged the lands of the intestate [*24] in October, 1888, to secure payment of £1,000 owing by her to the defendant in respect of property she had purchased from him after the death of the intestate, and that when making the agreement for this purchase, and when he took the mortgage, he knew that she was

administratrix, and that the land mortgaged to him formed part of the intestate's estate. The defendant tendered himself for cross-examination, but gave no evidence in support of the defence which he set up. The question to be decided is whether on this state of facts the mortgage should be set aside. If the land had not been under the "Transfer of Land Statute" the mortgage would be shown to be bad, inasmuch as it was made by the administratrix to secure her private debt; but as by Secs. 74 and 140 of the "Transfer of Land Act" the title of a proprietor is made absolute except in the case of fraud, the defendant's title is good unless the facts in evidence are sufficient proof of fraud within the meaning of these sections. Is it to be inferred from the facts in evidence, in the absence of explanation by the defendant, that he was acting dishonestly; or do the facts demand no explanation from him and require positive proof of a fraudulent intention in order to establish fraud? In support of the latter view the defendant relies on the words in Sec. 140: "No person shall "be affected by notice, actual or constructive, of any "trust, any rule of law or equity to the contrary not-"withstanding, and the knowledge that any such trust "is in existence shall not of itself be imputed as fraud." I think these words mean that the person dealing with a trustee shall have no duty cast upon him of seeing that the trustee is acting within his powers, or properly as regards those whom he represents; but that if the transaction is to the knowledge of the person dealing improper with regard to the cestui que trust, the concurrence in the breach of trust by the person dealing is actual, not constructive fraud, and therefore fraud within the section. The section does not say that concurrence in a breach of trust is not to be held to be fraud, but that knowledge of the trust is not of itself to be imputed as fraud. This knowledge is not an immaterial fact, and combined with concurrence in an act in breach of the trust will give rise to the imputation. I think, therefore, that in this case, the facts proved in the absence of any explanation were apparently in-

consistent with honesty and sufficient proof of fraud within the section. No knowledge of law is required to understand that a man ought not to pay his own debt with other persons' property, or that if he is a trustee for others, he ought not to use what belongs to those others for his own benefit. These plain rules of fair dealing are broken when an administrator sells or mortgages assets to pay his own private debts incurred before or after the death of the intestate, and the person so paid, who knows of the trust, must be taken to be dishonest when he remains silent though able to speak. I did not understand the plaintiff to contend that constructive fraud would be sufficient under Sec. 140, but that the facts in evidence, in the absence of any explanation, proved actual fraud, and with this contention I agree. I think that dangerous operation is given to the section in holding it to protect transactions such as the present, by throwing on the person impeaching them the onus of proving a fraudulent intent. The person whose dealing is apparently wrong may be able by explanation to remove the imputation, but if he does not explain, no further evidence of dishonesty than the dealing itself should be required. There is a decision of the late Mr. Justice Molesworth directly in point, in which he held that where a bank made advances to an administrator, which, to its knowledge, were made for the purpose of building upon the land which he held as administrator, the bank's mortgage over the land was invalid, having been given to secure expenditure which the bank knew to be illegal. The learned Judge did not in terms find that this amounted to fraud within the exception of the "Transfer of Land Statute," but said that the "Transfer of Land Statute" would not give protection to dealings by an administrator which would be invalid by an ordinary administrator ; and that an administrator cannot generally mortgage to a mortgagee, knowing, from the nature of the transaction, that he is not performing his duties: Droop v. Colonial Bank, 6 V. L. R. (Eq.) at p. 232. It is clear that under the old law a person taking the chattels of an administrator in payment of his own

debt, or as security for it, was answerable to the persons beneficially interested, and could not acquire title as against them. When the cases on the subject are examined, they appear to turn not on the equitable doctrines as to notice and constructive fraud, but on such transactions as the present being actual fraud on the part of the person dealing with the administrator. If this be the correct view these cases are authorities as to what should be considered fraud within the meaning of Sec. 140. As was said in Kean v. Robarts, 4 Maddocks, at p. 357: "Every person who acquires personal "assets by a breach of trust or devastavit in the ex-"ecutor is responsible to those who are entitled under "the will if he is a party to the breach of trust. Gen-"erally speaking, he does not become a party to the "breach of trust by buying or receiving as a pledge for "money advanced to the executor at the time any part "of the personal assets, whether specifically given by the "will or otherwise, because this sale or pledge is held "to be prima facie consistent with the duty of an ex-"ecutor. Generally speaking, he does become a party "to the breach of trust by buying or receiving in pledge "any part of the personal assets not for money advanced "at the time, but in satisfaction of his private debt, "because this sale or pledge is prima facie inconsistent "with the duty of an executor." And again in Wilson v. Moore, Mylne and Keen's Reports, Vol. I., p. 357: "If a "party dealing with an executor for the personal assets, "pays his money to the executor so that it may be "applied to the purposes of the will, he is not respon-"sible for the executor's misapplication of it; but if in "dealing with the executor he does in truth pay his "money for the private purposes of the executor, he is "equally a party to the breach of trust, whether he ap-"plies his money to the private debt [*25] of the execu-"tor or to the private trade of the executor. And now "let us ask, where is the mischief of holding parties "bound by such obvious rules of common justice and "honesty? The Privy Council gives its adhesion to "these principles in the case of Corser v. Cartwright,

"VII. English and Irish Appeals, referring to the case "of Watkins v. Cheek, decided by Sir John Leach, who "said : So a mortgagee or purchaser from the executor "of a part of the personal property of the testator has "a right to infer that the executor is in the mortgage "or sale acting fairly in the execution of his duty, and "not bound to enquire as to the debts or legacies. But "if the nature of the transaction affords intrinsic evi-"dence that the executor in the mortgage or sale is not "acting in the execution of his duty, but is committing "a breach of trust, where the consideration of the mort-"gage or sale is a personal debt, due from the executor "to the mortgagee or purchaser, there such mortgagee, "or purchaser, being a party to the breach of trust, does "not hold this property discharged from the trusts, but "equally subject to payment of debts and legacies, as "it would have been in the hands of the executor." I think that in the case now before us the transaction affords intrinsic evidence of the defendant's participation in a breach of trust. The defendant does not attempt to excuse or explain it, and therefore I think his conduct should be taken to be fraud within the meaning of the sections before referred to, and that judgment should be given for the plaintiff.

Williams, J.—The defendant being the registered proprietor of the mortgage under the "Transfer of Land Act," his title is absolute except in the case of fraud—Sec. 74. I take this to mean fraud to which the registered proprietor is privy. In the present case the onus of establishing that the defendant was guilty of fraudulent conduct in taking the security of the mortgage from the administratrix of the deceased's estate lies clearly upon the plaintiff. The plaintiff, as I understand him, contends that he has satisfied this onus when he proves a case of constructive fraud against the defendant, and that it is not necessary for him to prove actual dishonest or fraudulent dealing on the part of the defendant. If, however, I have misunderstood the plaintiff's contention, and he contends that he has established a case of actual fraudulent dealing on the part of the

defendant, then I am clearly of opinion that no such dishonest or fraudulent dealing can be fairly inferred from the facts. Had the plaintiff been able to satisfy the primary Judge that the defendant took this security from the administratrix with actual notice or knowledge that in giving it she was committing a breach of trust, the learned Judge would, no doubt, in that event have found as a fact that the defendant acted fraudulently. No such fact has been found, and the inference I draw from the evidence is that the defendant not only gave a substantial valuable consideration for the security, but that he took it perfectly honestly and in ignorance of any breach of trust on the part of the grantor of that security. It is, however, contended for the plaintiff, as I understand his contention, that it is unnecessary to prove actual notice or actual knowledge of a breach of trust, that to invalidate the defendant's title under the Act it is sufficient to prove constructive notice or knowledge. This brings me to the consideration of that which is after all the short point involved in this case; does such constructive notice or knowledge constitute "fraud" within the meaning of the Act? If it does, then the defendant's title is invalidated; if, on the other hand, actual notice or knowledge be required, as the plaintiff has failed to establish that fact, the defendant's title remains unimpeached. I think "fraud" in Sec. 74 means moral turpitude, actual dishonest dealing, and I do not think that it includes what is known as "constructive fraud." Sec. 140 of the Act, which provides that "no person shall be affected by notice actual or constructive of any trust, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust is in existence shall not of itself be imputed as fraud" amounts, in my opinion, almost to a statutory declaration that for the purpose of invalidating title under the Act "fraud" is not to include what is known and described as "constructive fraud," and the observations of a'Beckett, J., in the case of Lake v. Jones, 15 V. L. R. at p. 783, appear to me to point in the same direction. The question to be asked in these cases is this, did the defendant pur-

chase honestly (bona fide) and for valuable consideration? If he did, he acquires an indefeasible right. Except for the contention of constructive notice of a breach of trust, there appears to be no ground whatever for arriving at the conclusion that the defendant in this case did not deal honestly and for valuable consideration. He may have acted in ignorance of the law, he may have had unsound legal advice as to his position, and yet may have acted in perfect innocence of the fact that he was running any risk of making himself privy to a breach of trust. He was tendered by his counsel for cross-examination by the counsel for the plaintiff, who contented himself by asking him a few questions evidently with the view of establishing constructive notice of a breach of trust and that only. Nor do the facts establish that the defendant designedly abstained from inquiry for the purpose of avoiding knowledge. Had they done so it might have been contended that that wilful ignorance of this description is not distinguishable from actual knowledge, and therefore might constitute fraud within the meaning of the Act; but having regard to the view I take of the evidence, it is unnecessary to give any opinion upon this point. For the reasons I have given, I think that the plaintiff has failed to establish fraud sufficient to invalidate the defendant's title, and that judgment should be entered for the defendant with costs, including the costs of this reference.

Hood, J.—In order that the plaintiff should be entitled to judgment in this case, he has to establish that the mortgage given by Mrs. Wilson to Alger is invalid. But inasmuch as the defendant is the registered proprietor of a mortgage under the "Transfer of Land Act," and in addition acquired that mortgage by a dealing with a registered proprietor of a leasehold under the same Act, his title [*26] is conclusive so far as this action is concerned "except in the case of fraud." The object of the Legislature in passing the "Transfer of Land Act" was "to "give certainty to the title to estates in land and to "facilitate the proof thereof" (see the preamble to Act No. 301), and prima facie it appears "to have been the

"intention of the Act to confer the same kind and degree "of security upon all persons who, transacting in reli- "ance on the register, acquire either proprietary rights "or mere interests in land in good faith and for valuable "consideration" (Gibbs v. Messer (1891 A. C. at p. 254). The object of the Act "Is to save persons dealing with "registered proprietors from the trouble and expense of "going behind the register in order to investigate the "history of their author's title and to satisfy themselves "of its validity. That end is accomplished by providing "that everyone who purchases in bona fide and for value "from a registered proprietor and enters his deed of "transfer or mortgage on the register, shall thereby ac- "quire an indefeasible right notwithstanding the in- "firmity of his author's title" (Ib.). This being the intention of the Legislature, it can, in my opinion, only be carried out by holding that the fraud referred to in the Act is actual moral depravity, some intentional wrongdoing or wilful violation of the common rules of right and wrong; and I think that the Act has created a title indefeasible in honest hands, and has thereby prevented the numberless nice enquiries as to constructive notice and fraud that otherwise might often arise; and that, therefore, the title of a registered proprietor is not to be impeached on surmise or suspicion, or conjecture, or by reason of any artificial rule created by the Courts. This being my view of the Act, the plaintiff cannot succeed, for I fail to see anything in this case that would justify me in concluding that there has been any fraud by the defendant Alger, or that that defendant acted with mala fides, or had any fraudulent intent whatever. He parted with his property in consideration of getting his security, and I cannot think that any man would knowingly give away his own land in return for a security fraudulently obtained, and therefore valueless. If he had taken the security for a pre-existing debt, the inference might well have been different, and the circumstances might then have required an explanation from him; but all that was proved here was that a man finds a childless widow in possession of her late hus-

band's farm, and registered as proprietor of it, and he sells to her property, and in pursuance of the contract of sale takes from her a mortgage over that farm, to secure the payment of a part of the purchase money. It is really the same as though he had lent her £1,000 on the security of this mortgage, a thing no man would do if he knew that the mortgage was illegal and invalid. The fair conclusion from the facts, I think, is that Alger took this security in good faith, without any actual knowledge of any breach of trust, and without any idea that Mrs. Wilson was not acting properly on behalf of the estate. Indeed, having regard to the Administration Act, and Secs. 113, 114, and 138 of the "Transfer of Land Act," it is quite possible that Alger may have been advised by his lawyer (though I do not say correctly advised) that Mrs. Wilson could deal with this property as she pleased; and I am not able to arrive at a conclusion that a man is guilty of fraud when it is possible that he may only have been acting upon wrong advice given by his lawyer, and in perfect innocence. I have been largely influenced in the opinion I have formed on the facts by the mode in which the case was conducted at the trial. Mrs. Wilson was not called by either party, but the defendant Alger was tendered for cross-examination. He was, however, merely questioned in order to show constructive notice, and not a word was said to him to challenge his honesty or calling upon him to give any explanation of his conduct. No direct evidence of any sort was adduced to show that he had been guilty of any impropriety, and under these circumstances the plaintiff has failed to satisfy me that the transaction attacked was in any way tainted with fraud. It was, however, strenuously urged for the plaintiff that, as ignorance of the law excuses no man, the defendant Alger could not escape, and that as he knew he was taking an intestate's estate as security for dealing with an administratrix, he must be assumed to have known that he and she were acting illegally. This maxim, however, may easily be pushed too far, and it is not correct to say that for all intents and purposes a person must be taken

to know the legal consequences of his acts (The Queen v. Mayor of Tewkesbury, L. R. 3 Q. B. at p. 639, per Lush, J.), and when fraud is to be established it is knowledge that has to be proved and not ignorance. The maxim referred to, therefore, does not apply to a case like the present, where the plaintiff has to prove actual dishonesty. As to the case of Droop v. The Colonial Bank (6 V. L. R. Eq. 228), relied upon by the plaintiff, it seems to me to be distinguishable. The learned Judge there appears to have drawn the inference of fact which in this case I cannot draw, viz., that the defendants knew that they were doing wrong (see statement of facts, p. 232). A decision that any particular facts amount to fraud, so as to satisfy one particular tribunal dealing with facts, cannot bind another like tribunal even though dealing with similar facts. If, however, that decision of the learned Judge in Droop's case was one of law purely, then to assist the plaintiff here it must be to the effect that constructive fraud is sufficient, and this, I think, would be erroneous, so that sitting in this Court I ought not to follow it. Moreover, I think that considerable doubt, to say the least of it, is thrown on that decision by the Appellate Court (7 V. L. R. Eq. 71), and for these reasons I do not feel bound to follow it even if in point. In my opinion the plaintiff is not entitled to any judgment, and I concur with Williams, J., in holding that there should be judgment for the defendant with costs, including costs of this reference.

Solicitors for the plaintiff:—Ellison & Simpson.

Solicitors for the defendant:—Wisewould, Gibbs & Wisewould

SUPREME COURT, VICTORIA, 1890.] [16 V. L. R. 793.

IN RE PALMATEER.

"Transfer of Land Act, 1890," secs. 236, 237—Assignee of insolvent estate, application by—Caveat—Insolvent proprietor—Registration.

Where the assignee of an insolvent estate, having lodged a caveat against any dealing with land forming part of such estate, makes an application to be registered as proprietor under Sec. 236 of the "Transfer of Land Act, 1890," during the existence of such caveat the registrar is bound to ignore all dealings by the insolvent proprietor with land under the operation of the Act and to register the assignee.

This was a summons calling upon the Registrar of Titles to substantiate and uphold the grounds of his refusal to register a transfer from the applicant Palmateer to one Noonan.

It appeared from the facts disclosed upon the affidavits that Palmateer became insolvent in April, 1878, and Cohen was appointed as assignee of his estate. At the time of his insolvency Palmateer was registered proprietor of one piece of land and was the licensee of another piece. In January, 1885, he became the Crown grantee of this other piece of land. On the 20th December, 1889, he applied to the Court of Insolvency for his certificate of discharge, which was issued on the 4th January, 1890. On the 24th December, 1888, Cohen, the assignee, entered a caveat forbidding the registration of any person as proprietor of both pieces of land, and on the 2nd January, 1890, notice of this caveat was sent to Palmateer. On the 22nd February, 1890, Palmateer sold the whole of the land to Noonan, and on the same day lodged a transfer at the office of the Registrar of Titles for registration. Notice of this transfer being lodged was sent to Cohen on February 26th, 1890, and on the 12th March Cohen applied to be registered as proprietor in respect of the land. The registrar refused to register the transfer

from Palmateer to Noonan on the grounds that, as the assignee had made his application to be registered during the pendency of the caveat, he alone was entitled to be registered, and the effect of the caveat was to effectually prevent any dealing with the land by any other person during the existence of such caveat. The applicant Palmateer thereupon took out the present summons.

Topp for the Registrar of Titles :—The caveat issued by the assignee prevented any other person dealing with the land during [*794] the pendency of the caveat. The assignee is empowered by Sec. 236 of the "Transfer of Land Act, 1890," to apply to be registered as proprietor of the land held by the insolvent, and the caveat does not affect his own application. Then Sec. 237 gives an insolvent proprietor power to deal with the land, but that power is specifically limited ; he can only become registered "until such application shall be made as aforesaid," that is, until the assignee has made an application under Sec. 236, as he has done in this case ; and the section goes on "and subject to the operation of any caveat lodged by such assignee." The operation of the caveat was to prevent any dealings with the land by any person. It follows clearly that if the application has been made by the assignee, and if the caveat is still in force, or was in force when the application was made, the insolvent cannot deal with the land, and his transfer cannot be registered. The registrar was bound to register the assignee, as the assignee had a statutory right under Sec. 236 to be registered.

Isaacs (with him Irvine), for the applicant :—Secs. 236 and 237 are not intended to alter the law ; they are merely procedure sections. They certainly do not alter the law as regards "after-acquired" property by the insolvent. The portion of the land which was acquired by the insolvent subsequently to the sequestration of the estate does not vest in the assignee : Cohen v. Mitchell.[1]

[1] 25 Q. B. D. 262.

[Williams, J.—That case does not affect this present case, because here there was a distinct intervention on the part of the assignee when he lodged the caveat.]

The lodging of the caveat is only a notice; it is not an intervention within the meaning of the "Insolvency Act." The caveat might have justified the registrar in refusing to register during its continuance, but it has lapsed now, and the application by the assignee to be registered does not keep it alive or continue its effect. It was incumbent upon the caveator to take proceedings in Court during the existence of the caveat, and the registrar under those proceedings is directed by the Court to do or to refrain from doing certain things; but it is only by virtue of the proceedings in the Court that the caveator can derive any benefit. [*795]

Counsel referred to the following cases: Patchell v. Maunsell;[2] Madden v. Hetherington.[3]

Topp, in reply.

Cur. adv. vult.

Williams, J.—This was a summons to the Registrar of Titles, under Sec. 209 of the "Transfer of Land Act, 1890," calling upon him to substantiate and uphold the grounds of his refusal to register a transfer from Palmateer to Noonan.

The facts of the case, so far as they are important, are as follows: It appears that Palmateer was Crown grantee of a certain portion of the land in question; he became Crown grantee of a certain portion in 1877; then in April, 1878, he sequestrated his estate, and Cohen was appointed official assignee of the estate. In January, 1885, Palmateer became Crown grantee of the residue of the land, and therefore, in 1885, Palmateer was the Crown grantee of the whole of the land, which formed the subject matter of this application. After this, Palmateer applied to the Court of Insolvency at Melbourne for a certificate of discharge under the "Insolvency Statute," and that application came on to be

[2] 7 V. L. R. (Eq.) 6.
[3] 3 V. R. (L.) 68.

heard on the 20th December, 1889 ; it was opposed, but the application was allowed, and on the 4th January, 1890, the certificate of discharge was granted ; this was an unconditional certificate. On the 24th December, 1889, Cohen, the assignee of the estate, lodged a caveat against any dealing with the land, the subject matter of this application ; on the 2nd January, 1890, the registrar sent to Palmateer a copy of that caveat. On the 22nd February, 1890, Palmateer sold the land for value bona fide to Noonan, the present applicant, and on the same day he executed a transfer of his land to Noonan, and on the 24th February that transfer was lodged for registration at the office of the Registrar of Titles. On the 26th February, 1890, two days after this transfer was lodged, the registrar gave notice to Cohen, the assignee of the estate and the caveator, that Palmateer had applied for registration of the transfer of land to Noonan. The next step is that, on the 12th March, 1890, Cohen makes an application in writing, under Sec. 236 of the "Transfer of Land Act, 1890," to be registered in respect of the land. Upon that state of [*796] facts the question has arisen whether the application by Palmateer to have the transfer from him to Noonan registered should not have been entertained by the registrar, and granted by him, inasmuch as it was lodged before the application that was made by the official assignee under Sec. 236.

The contention for the registrar was this : He admitted that the transfer from Palmateer to Noonan was lodged for registration before the assignee made his application, but he said that before that was done, before the insolvent lodged that transfer for registration, the assignee had entered a caveat against any dealing with the land ; that it had been lodged by the assignee for the protection of the insolvent estate, and that it was so lodged before the fourteen days from the giving of the notice, which I have referred to, had run out, namely, on the 12th March. The registrar therefore contended that while the caveat lodged by the assignee was in force the assignee made this application under Sec. 236, and that then all dealing by the insolvent with any por-

tion of his estate was prohibited by the Act. The registrar supported this contention on the provisions of Secs. 236 and 237. Speaking for myself, I am disposed to think that the position thus taken up by the registrar was correct. I can draw no distinction between the two portions of the land. There is no doubt that one portion was acquired by the insolvent after his insolvency and the other portion before sequestration; whether these both vested absolutely in the assignee or not, without any further motion on his part, it is unnecessary to determine. If the registrar was right in refusing the application to register as to the land acquired before sequestration, he would be entitled to refuse to register altogether; it is all one transaction; and, therefore, if he was right to refuse as to part, he was right to refuse as to the whole.

But if an act of intervention was required in order to vest in the assignee the estate acquired by the insolvent since his insolvency, I think that that exists here, inasmuch as by lodging this caveat the assignee appears to me to have claimed this land in a most emphatic way as his property as representing the insolvent estate, and he follows up that unequivocal act of proprietorship by making an application under Sec. 236; and therefore, I think that if an act of intervention on the part of the [*797] assignee is required, it exists here, and that the whole of the estate vests in the assignee.

Then we have to consider whether the fact that the assignee makes that application under Sec. 236 before the caveat, which had been lodged by him as assignee, expires, prohibits or stops Palmateer from dealing with this land in any way under the "Transfer of Land Statute." I think that it does. The principal reason for my decision is the construction I place upon Sec. 237. Whatever doubt may exist under Sec. 236, Sec. 237 clears away that doubt. That section provides that "until such application shall be made as aforesaid," that is, under Sec. 236, "and subject to the operation of any caveat which may be lodged by such assignee, dealings by an insolvent proprietor with land under the Act may be

registered, and thereupon shall not be affected by the order of sequestration either at law or in equity." Now I think that the plain meaning of these words is that, if that application is made by the assignee under Sec. 236, and if it is made while the caveat which he has lodged as assignee is in operation, then all dealings by the insolvent proprietor shall not be noticed by the registrar. I think all those steps have been made in the present case. The mere fact of the assignee making an application would not be sufficient in the event of the insolvent having lodged his application for registration before; but if the assignee has lodged his caveat as assignee in respect of any portion of the insolvent estate, that is, in respect of land under the Act, that prohibits the registrar from registering the insolvent's application. If while the caveat is in force the assignee proceeds to make application under Sec. 236, and does so under shelter of the caveat, then I think upon that state of facts the registrar is bound by reason of Sec. 237 to ignore all dealings by the insolvent proprietor under the operation of the Act. These were the facts in this case, and therefore I think the registrar was right in refusing to register this transaction between Palmateer and Noonan.

Webb, J.—In this case I concur in the judgment of the Court that the registrar has sustained and upheld his decision. The insolvent, at the time of the sequestration of the estate, was seised of certain lands; he also at that time was interested, under a [*798] license under the "Land Act," in certain other land, and by virtue of that license he subsequently acquired the fee. I think that as to both portions of the land they were the property of the insolvent. Taking it that he was seised of one piece of land and afterwards became seised of another as to which he had not any interest at the time of sequestration, still the provisions of Sec. 236 apply equally to both. [His Honour read the section.] That section appears to me to give a statutory right to the assignee, when he has complied with the provisions of the section, to insist upon being registered as the transferee of the land. Now in this case the assignee did, on the

12th March, 1890, lodge the necessary papers, and required to be registered, so that there was nothing then to prevent his obtaining his statutory right. There was a caveat lodged by himself, but a caveat does not prevent the registration of a document tendered for registration by the caveator. The assignee lodged his caveat on the 24th December, 1889, which caveat prevented anybody else dealing with the land during its pendency. A transfer from Palmateer to Noonan was lodged for registration ; the assignee's caveat prevented that being registered ; and notice of the lodgment of that transfer being given to the assignee, he, during the pendency of his own caveat, lodged an application to be registered under Sec. 236. I think he had then a statutory right to be registered. I was at first inclined to think the words in Sec. 237 "subject to the operation of any caveat" meant the ordinary operation under the antecedent sections, and that the way to protect the caveat was to obtain the adjudication on the matter by a competent Court ; but, upon further considering the matter, I think these words mean that whilst the caveat lodged by an assignee is in existence nothing else can be done by any other person, and no one else can be registered. And if the assignee, while no one else can be registered because of his caveat, tenders his application in writing to be registered, he has a statutory right to be registered which the existence of his own caveat does not affect.

Hodges, J.—In this case one Palmateer, an insolvent, lodged on the 24th February a transfer to one Noonan, at the office of the Registrar of Titles, for registration. That transfer covered land of which [*799] he was proprietor before he was insolvent, as well as land of which he became proprietor subsequent to his insolvency. At the time he lodged his transfer there was in force in the office a caveat lodged by the assignee. Whilst that caveat was in force, the assignee applied under the section which corresponds to Sec. 236 of the present Act to be registered, and the question is whether under these circumstances the application by Palmateer can be granted. If it cannot be granted as to the land of

which he was proprietor before he was insolvent, it cannot be granted at all, as the registrar has no power to split the transaction into two. The "Insolvency Act" vests in the assignee of the insolvent absolutely all the property of which the insolvent is possessed at the time of his insolvency, and were it not for what I may call "Registration Acts," all legal and equitable ownership would pass too. But by reason of certain legislation, the legal ownership in land under the "Transfer of Land Act" remains in him, but the beneficial ownership is gone, and we have to see (the beneficial ownership being out of the insolvent) how he can convey what is left in him. He can only do this so far as power is given to him by the "Transfer of Land Act." That power is given by Sec. 237, and that power is given "until such application shall be made as aforesaid, and subject to the operation of any caveat which may be lodged by such assignee." In order to give to that section the construction contended for by the applicant, that section would have to be "until and after such application the insolvent may have his dealing registered, provided that such application be made before the application of the assignee is made." That would necessitate the insertion into the section of important words which are not there; and unless he has power under Sec. 237 to transfer, and to require the registrar to register his dealing, no other section in the Act gives him any such power. It is only "until" such application that he can be registered, and after such application he cannot be registered. The section goes on: "And thereupon shall not be affected by the order of sequestration, either at law or in equity;" but it is only "thereupon." Until the registration there is no legal title in the transferee from the insolvent. The only other way in which it was put by the counsel for the applicant, was that by reason of Sec. 55 dealings [*800] had to be registered in the order of application; but, as was pointed out by Webb, J., during the argument, Sec. 55 relates to the registration of "instruments," whereas Sec. 236 relates to the registration of an "individual" as a proprietor. I am not prepared to say

that the same reasoning would not apply to after-acquired property, and that that section would not cover in the same way the whole subject matter of this application. I am inclined to think that it does so cover it, but it is not necessary to decide that question in the present application.

Solicitor for applicant:—Manton.

Solicitor for the Registrar of Titles:—Guinness, Crown Solicitor.

SUPREME COURT, VICTORIA, 1891.] [14 A. L. T. 265.

BETHUNE v. PORTEOUS.

"Transfer of Land Act, 1890"—Owner in adverse possession—Action by, against person holding paper title—Injunction.

An injunction was sought by an owner in adverse possession whose title had matured to restrain the person holding the paper title to the land from proceeding with an application to have himself registered as proprietor under the "Transfer of Land Act, 1890." The plaintiff proceeded as by ordinary action, and did not invoke the special jurisdiction given to the Court by section 34 of the "Transfer of Land Act, 1890." No objection to the plaintiff's mode of procedure was taken on the pleadings nor at the trial, and the Court granted the injunction as sought. Held, on appeal, that the Court had jurisdiction to grant the injunction as sought, and that under the circumstances it was rightly exercised.

A person who has a title by adverse possession has a right to restrain a person who holds the paper title from proceeding to obtain a certificate of title under the "Transfer of Land Act, 1890."

Ex parte Brown, 5 V. L. R. (L.) 5, overruled.

[*266] The facts appear sufficiently in the judgment.

Mr. Box and Mr. Hayes, for the defendant appellant, stated the facts. [a'Beckett, J., referred to Ex parte Brown, 5 V. L. R. (L.) 5.] There is no evidence of adverse possession, because in July, 1883, the plaintiff's father, under whom the plaintiff claims, contracted with Alfred Bliss, an agent of the defendant, to buy this land from the defendant. That contract is an acknowledgment of the defendant's title, and shows that up to that time the plaintiff or his predecessors did not claim adversely: Sanders v. Sanders, 19 Ch. D. 373. The plaintiff must show occupation or possession from the time

the defendant had a right to make entry. [a'Beckett, J.—All he has to show to start his action is that he has been in adverse possession for fifteen years.] In this action he must show thirty years' possession, because he asks for a declaration of title, and the 3rd clause of the contract is very strong evidence that he was not in adverse possession at the time when his possession first commenced: Good v. Job, 28 L. J. N. S. Q. B. 1. The contract is a sufficient acknowledgment to make his possession the defendant's possession. The contract creates an estoppel: Hole v. Burton, 16 Q. B. D. 807.

Mr. Kilpatrick for the plaintiff respondent:—The plaintiff was forced to frame his action as he did, otherwise he would not have got any relief. If he was asking for a declaration of title against all the world he might have to prove a thirty years' title, but he is not. All he is seeking is a declaration of title against the defendant. [Hodges, J.—If you come here to establish your title you must prove a thirty years' title.] But he is not; all he is seeking is a declaration of title against the defendant. [Hodges, J.—If you come here to establish your title you must prove your title.] All the plaintiff has to show is that he is entitled as against the defendant, that is, that he has been in adverse possession for fifteen years: Solomon v. Jarvis, 12 V. L. R. 878. [Williams, J.—You are asking us to make an order that the appellant shall not register himself as proprietor; surely before you can ask that you must show us that he has no title.] The plaintiff ought not to have to prove a negative. The plaintiff's title was complete in 1881, long before that alleged contract was entered into, and that being so, that so-called contract does not operate as an acknowledgment of the defendant's title: Sanders v. Sanders, 19 Ch. D. 373, followed in Hobbs v. Wade, 36 Ch. D. 553. This alleged acknowledgment is not conclusive in any aspect. All it amounts to, putting it at its highest value, is some evidence that the defendant claimed the land, and that the plaintiff said, "Very well, if you can make title I will buy the land from you:" Curzon v. Edmunds, 6 M. & W. 295.

Mr. Box, in reply, referred to the Corporation of Dublin v. Judge, 11 I. L. R. 8.

Cur. adv. vult.

a'Beckett, J., delivered the judgment of the Court :—This is an appeal from a judgment restraining the defendant from bringing certain land under the operation of the "Transfer of Land Statute." The plaintiff, by his statement of claim, alleged that his father entered into adverse possession of the land in the year 1857, and contracted to buy it from the defendant in the year 1883. That in the year 1887 his father died and the plaintiff administered to the estate, and that he, as administrator, continued the possession which his father begun. He claimed specific performance of an agreement and an injunction to restrain the defendant from further proceeding with an application, which he had lodged, to bring the land under the Act in his own name. Evidence of adverse possession was given at the trial, but the plaintiff gave no evidence of the contract alleged. A contract signed by the plaintiff's father in the year 1883, and purporting to be made with Alfred Bliss as agent of William Porteous, the defendant, was put in by the defendant, as an acknowledgment of the defendant's title, operative under Sec. 30 of the "Real Property Act, 1890," to extend the period within which the defendant might sue to recover the land. This agreement was the agreement which the plaintiff set up by his statement of claim, alleging that it was made by Alfred Bliss as agent for the vendor. The defendant by his pleading denied the making of the agreement, and explicitly denied that Alfred Bliss had any authority whatever from the defendant to enter into any contract with reference to the land. There being no evidence of the agency of Bliss given on either side, the claim for specific performance was necessarily abandoned, and the plaintiff got the only relief to which he could be entitled on his evidence of adverse possession—an injunction to restrain the defendant from obtaining a title to the land under the "Transfer of Land Statute." The argument before

us has been as to whether the agreement was an acknowledgment of title under the Statute of Limitations, and whether, assuming it to be an acknowledgment, it could be operative after fifteen years of adverse possession. If the plaintiff had been suing in an ordinary action of ejectment it would have had no such effect. There being no evidence of any disability on the part of the defendant, the plaintiff would have shown a title gained by possession before the giving of the acknowledgment, and the subsequent acknowledgment would therefore have been inoperative. But it was contended that in this action a different rule would prevail, as the plaintiff claims the right to exclude the defendant for all time from showing to the satisfaction of the Commissioner of Titles that he is entitled to the land, as he might show by proving that he was under disability within this fifteen years. It was contended that in an action of this kind the plaintiff must show possession for thirty years, by which an absolute title would be gained by virtue of Sec. 30 of the "Real Property Act," notwithstanding any disabilities on the part of those against whom title was gained. On that view the acknowledgment, though after fifteen years' possession, would be effectual to destroy the right which the plaintiff asserted. We need not decide as to the necessity for proof of thirty years' adverse possession to entitle the plaintiff to the absolute injunction granted in this case, as we think that the agreement relied upon by the defendant is not a sufficient acknowledgment within Sec. 34, not having been made to the person entitled, [*237] or to his agent, as required by that section. It was not made to the plaintiff himself, and the defendant denies the agency of Bliss, to whom it was made, if made at all. On this view it is necessary to determine whether this agreement, which required the vendor to show title, and only bound the purchaser to completion upon his doing so, could be held to be a sufficient acknowledgment of title under Sec. 34. The appeal fails on the only points raised before us, and before the primary Judge; but there are others which it is necessary to notice, having regard to

previous decisions of this Court. It has been held, that the mere fact that an application has been made to bring land under the "Transfer of Land Statute" by an adverse claimant did not entitle the owner to sue the applicant, unless the plaintiff could adopt some already recognised procedure by action or suit, as in trespass or ejectment at law, or to enforce a trust or specific performance in equity. See Hodgson v. Hunter, 3 A. J. R. 13. Where the owner could not do this he was in a difficulty, and to enable him to protect himself in such a case, the Court held that it had a special jurisdiction under Sec. 24, now Sec. 34, of the Act, which was first exercised in the case of Ex parte Gunn, 3 V. L. R. (L.) 36. This special jurisdiction has not been invoked in the present case, and when the claim for specific performance was abandoned nothing was left but a claim to an injunction by an owner in possession which, according to the authorities referred to, could not have been enforced by an ordinary action. The objection, however, was not taken by the pleading to the alternative relief sought by the statement of claim, nor at the trial when the case for specific performance broke down. The Court had jurisdiction to grant the injunction, and we think that under the circumstances it was rightly exercised. Another objection which might have been, but was not, raised to granting the injunction was that, according to the decision in Ex parte Brown, 5 V. L. R. (L.) 5, a person who has acquired title by adverse possession has no right to restrain a person having title by deeds from applying for a certificate of title, because if the certificate should issue it would be subject to all rights subsisting by adverse possession. We do not agree with this decision. If the title by adverse possession has matured, the applicant for a certificate has no title which the commissioner ought to recognize, and giving him a certificate would enable him to harass the rightful owner, and in case of possession becoming vacant, to enter and prevent him from recovering possession by force of Sec. 205 of the "Transfer of Land Statute." We therefore decline to follow Brown's

case, which must be considered overruled. Mr. Justice Holroyd, the only additional Judge before whom this case could be argued if reheard, authorises us to state that he also disapproves of Brown's case. The appeal is dismissed with costs.

Solicitor for the appellant:—Hopkins.

Solicitors for the respondent:—Lynch, McDonald, Stillman & Keep.

SUPREME COURT, VICTORIA, 1893.] [15 A. L. T. 85.

IN RE SMITH.

Mortgage under the general law—Land subsequently brought under the Transfer of Land Act—Foreclosure.

Where land under the general law is mortgaged, and the land is subsequently brought under the "Transfer of Land Act," the mortgagee cannot obtain a foreclosure order under Sec. 129 of the "Transfer of Land Act, 1890."

Summons calling on the Registrar of Titles to substantiate his grounds for refusing to order a foreclosure under Sec. 129 of the "Transfer of Land Act, 1890." In this case Annie Mary Smith applied for an order for foreclosure of certain mortgages held by her over land owned by John Bowring Journeaux, but her application was refused. She then took out the present summons calling on the Registrar of Titles to substantiate the grounds of his refusal. It appeared that by a transfer registered in the register book on the 25th March, 1887, by endorsement on certificate of title, vol. 1,138, fol. 227, 579, and numbered 186,323, John Bowring Journeaux became the registered proprietor of an estate in fee simple in the land comprised in the said certificate. By an instrument of mortgage under the "Transfer of Land Statute," registered in the register book by endorsement on the said certificate on the 25th March, 1887, and numbered 80,520, the said J. B. Journeaux mortgaged to Annie Mary Smith the whole of the land comprised in the said certificate. By an instrument of mortgage under the said statute, registered in the register book by endorsement on the said certificate on the 15th May,

1890, and numbered 112,521, the said J. B. Journeaux mortgaged the same land to one Bays Thomas Belson. By an indenture of mortgage dated the 25th March, 1887, registered in the office of the Registrar-General, No. 347, book 337, made under the general law, the said J. B. Journeaux, in consideration of £750, that day lent to him by the said A. M. Smith, granted and conveyed to her and her heirs certain other lands then under the general law, but now comprised in certificate of title, vol. 1,931, fol. 386,112, to have and to hold the same unto and to the use of the said A. M. Smith, her heirs and assigns forever, subject to a proviso of redemption and re-conveyance. In 1887, during the continuance of the last mentioned mortgage, the said J. B. Journeaux, as the owner of the equity of redemption thereunder, applied to have the land comprised in the mortgage brought under the "Transfer of Land Statute," and a certificate of title, vol. 1,931, fol. 386,112, dated the 29th August, 1887, was issued to him, declaring him to be the proprietor of an estate in fee simple, subject to the incumbrances notified thereunder, and at the foot of the said certificate the said mortgage was specified as the incumbrance referred to. By an instrument of mortgage under the "Transfer of Land Statute," registered in the register book by endorsement on the said certificate on the 15th May, 1890, and numbered 112,521, the said J. B. Journeaux mortgaged to the said B. T. Belson the whole of the land comprised in the said certificate. In each of the said mortgages to A. M. Smith there was a declaration that the two mortgages should be one and the same security for one and the same sum, and that neither should be redeemed without the other, and that all powers contained or implied therein might be exercised at one and the same time. On the 20th February, 1893, the said Ann Smith applied to the Commissioner of Titles for an order for foreclosure of the said two mortgages, under Sec. 129 of the "Transfer of Land Act, 1890," and in support of her application lodged statutory declarations which proved to the satisfaction of the commissioner that default had been made in payment

of the principal and interest moneys secured by the said mortgages, and had continued for six months; that the land comprised in the two mortgages had been offered for sale by auction by a licensed auctioneer, after due notice of sale, and that the highest bidding was not sufficient to satisfy the mortgage debt and expenses of sale, and that notice of intention to apply for a foreclosure order had been served upon the mortgagor, and also on the said B. T. Belson, the only other person interested in the said lands, and the application was accompanied by the certificate of the auctioneer who put up the land for sale. By the said statutory declarations, the auctioneer's certificate and the newspaper advertisement of sale mentioned in such certificate, it appeared that the different lands comprised in the said two mortgages were put up as one lot and not offered separately. The Commissioner of Titles refused to make an order for foreclosure, on the grounds "That the said mortgage of the 25th March, 1887, in the office of the Registrar-General, book 337, No. 347, of the land which is now comprised in the certificate of title, vol. 1,931, fol. 386,112, dated the 29th August, 1887, is a mortgage in fee with power of sale under the general law, and vested the legal estate in the mortgagee; and the rights and remedies of the mortgagee, including that of foreclosure and the powers of disposal of the said mortgaged premises, are under the general law and not under the 'Transfer of Land Act, 1890.'

"That there is no provision in the said Act enabling such a mortgagee to foreclose under the procedure prescribed by the Act for foreclosure of mortgages under the Act, or enabling the commissioner to make the order applied for; and Sec. 135 of the Act assumes that before a mortgagee can become a registered proprietor on foreclosure of land under the Act, subject to a mortgage under the general law, he has first foreclosed under the general law.

"That as the mortgagee, under the general law, can at any time validly dispose of, encumber, or otherwise deal with the land or mortgage by contracts or assur-

ances under the general law, without the same being registered or known to or ascertainable by the public or the office of titles, to permit such mortgagee to foreclose by an ex parte application under the procedure of the statute would facilitate fraud and imperil the assurance fund.

"That the lands comprised in the two separate mortgages should not have been offered for sale in one and the same lot, and their being so offered rendered the attempted sale invalid for the purpose of supporting a foreclosure order under the provisions of the Act."

Mr. Agg in support of the summons.

Mr. Guinness to oppose :—The Court has no jurisdiction to deal with this case inasmuch as the Registrar of Titles cannot be called upon to substantiate his grounds for refusing to grant the foreclosure order. [*87] There was no direction here by the Commissioner of Titles under Sec. 209 of the Act. A refusal to make a foreclosure order is discretionary. [Madden, C.J.—That is surely not so. Where a section of an Act of Parliament creates a new jurisdiction "may" means "must."] One of these mortgages was a common law instrument, and applications under Secs. 129 and 130 of the Act are confined to instruments registered under the Act. Counsel during his argument referred to Shaw v. Scott, 3 A. J. R. 16.

Mr. Agg called on :—Both these mortgages provided that they should be one and the same security. The land having been brought under the Act the mortgage was also brought under the Act, because there is no power to bring an equity of redemption under the Act. The land was brought under the Act subject to a mortgage, and therefore the commissioner must deal with it under the Act. It was not the equity of redemption that was brought under the Act, but the absolute fee simple of the land, and that being so there is no power to deal with the mortgage under the old law. [Holroyd, J.—If the mortgagee's rights still exist under the mortgage deed his right to foreclosure under the deed still exists and is not taken away by bringing the land under the Act.] The mortgages themselves provide that they shall be re-

deemed together, and that they shall be security for the same sum. With regard to the second objection, the application was not ex parte but on notice, and as to the last objection the registrar is clearly wrong.

Counsel during the course of his argument cited Greig v. Watson, 7 V. L. R. (E.) 79, and Ross v. Victorian Permanent Building Society, 8 V. L. R. (E.) 254, at p. 272.

Madden, C.J., delivered the judgment of the Court:—In this case we are of opinion, speaking generally, that having regard to the features of the case itself, the decision of the registrar was right. The view he has taken of the Act in relation to this land, which was mortgaged under the old Act, is, we think, correctly conceived. As to the argument advanced by Mr. Agg, that this case is an exception to the general and settled rule because the parties agreed that each instrument should be a security for the same sum, we do not think it is sustainable. The fallacy of that argument seems to us to be that it does not observe that this is an application for foreclosure, and not the exercise of a power of sale. Under a power of sale the mortgagee and mortgagor might do what they agreed to do. But where the matter is one not springing out of the exercise of the power of sale, but is based on the section of the Act authorising foreclosure, then in that case the sale must be a sale such as is contemplated by the Act, and not such a sale as has been agreed to between the parties. We therefore think that this summons must be dismissed with costs.

Solicitors for the applicant:—Wisewould, Gibbs & Wisewould.

Solicitor for the Registrar of Titles:—Guinness.

DIGEST

OF

ALL THE CASES REPORTED

IN THIS VOLUME.

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NOTE.—The numbers in the margin are the pages of this volume at which the several cases here digested will be found reported.

BRINGING LAND UNDER THE ACT.

(a) WHAT INTEREST IN LAND MAY BE REGISTERED.

Incorporeal hereditaments.

The Court does not lay down as a rule that all incorporeal hereditaments are incapable of registration. For example, a rent-charge issuing out of land not brought under the Act may be the subject of a certificate of title. The rule extends only to those incorporeal hereditaments which consist of mere easements as distinguished from actual estates in the land. In re the "Transfer of Land Statute," Ex parte Cunningham, 3 V. L. R. (L.) 199..... 138

Trustee in fee, not having power of sale, may make application.

Section 17 (1) of the "Transfer of Land Statute" (Victoria, No. 301), provides that the person claiming to be the owner of the fee simple, either at law or in equity, may apply to bring the land under the Act. Held, that trustees in fee of land, not having power of sale, are "owners" within the meaning of Sec. 17 (1), and entitled to bring land under the operation of the Act. In re the "Transfer of Land Statute" and In re application of Benn & Grice, 12 V. L. R. 366..... 282

Application on behalf of paper title may be restrained by owner in adverse possession.

An owner in adverse possession, whose possessory title had matured, sought to restrain the person holding the paper title to the land from proceeding with an application to have himself registered as proprietor under the "Transfer of Land Act, 1890" (Victoria). The plaintiff did not invoke the special jurisdiction given to the Court by that Act, but proceeded

as by ordinary action. No objection was taken on the pleadings, nor at the trial, to the plaintiff's mode of procedure, and the Court granted the injunction as sought. Held, on appeal, that the Court had jurisdiction to grant the injunction as sought, and that under the circumstances it was rightly exercised. Bethune v. Porteous, 14 A. L. T. 265 553

Jurisdiction of Courts to interfere.

H., who had entered as a tenant to K., after her decease, intestate, without next of kin, set up title by possession and made application to bring the land under the "Transfer of Land Statute" (Victoria). A caveat was lodged on behalf of the Crown, and it was held that a Court of Equity had jurisdiction to entertain an information by the Attorney-General for a declaration of the title of the Crown by escheat, although the information showed a legal title in the Crown and no special ground of equitable jurisdiction. The injunction asked was granted, restraining the Registrar of Titles from dealing with the land. Attorney-General v. Hoggan, 3 V. L. R. (E.) 111..... 134

(*b*) DUTIES OF REGISTRAR OR COMMISSIONER.

Has a discretion to refuse to register applicant.

The true construction of Secs. 19 and 21 of the "Transfer of Land Act, 1874" (West Australia), is that the commissioner, though he has intimated to an applicant for registration that his title is fairly made out, is not bound to register the title merely by reason of the issue of the prescribed notices and the non-appearance of a caveat. Such notices may produce information, and the commissioner, in consequence thereof, or of reconsideration, has a discretion to refuse to register. The remedy of the applicant is, under Sec. 120, to require the commissioner to set forth his reasons, and then summon him before the Court to maintain his case. Manning v. The Commissioner of Titles, L. R. 15 App. Cas. 195..... 21

To investigate all questions, though he may think one objection fatal.

When in the investigation of title upon an application to bring land under the "Transfer of

Land Statute" (Victoria, No. 301), one objection appears which the commissioner considers fatal, yet all questions arising on the title should be considered; the applicant ought not to be compelled to take out several summonses on one title. In re the "Transfer of Land Statute," Ex parte Bowman, 7 V. L. R. (L.) 314.. 383

To postpone application if appeal pending.

The Registrar of Titles is not justified in refusing to bring land under the "Transfer of Land Statute" (Victoria, No. 301), solely on the ground of an interpretation by the Commissioner of Titles of a devise in a will, in opposition to a decision of the Supreme Court on the same devise; and that, although his interpretation is supported by a decision of the Supreme Court of a neighbouring colony upon the same devise. His course, if an appeal depends, is to postpone the determination of the application until the question has been finally decided on appeal. But, as he is the guardian of the assurance fund, the Court is slow to certify "that there was no probable ground for such refusal," so as to deprive him of his costs of a summons under Sec. 135. In re the "Transfer of Land Statute," Ex parte Bowman, 7 V. L. R. (L.) 314..... 383

May take increased indemnity for uncertain title.

A trustee, having power to sell or mortgage, executed a mortgage containing a power of sale in case of default. The purchaser from the mortgagee applied to bring the land under the "Transfer of Land Statute" (Victoria, No. 301). The Commissioner of Titles refused to register the land. Upon the case stated by the commissioner, it appeared that, while at law the validity of the sale could not be impeached, the probability of the sale being supported in equity depended on whether the land was sold at an undervalue, or whether there was any irregularity that had not been disclosed. Held, that the commissioner must register the purchaser, but could protect the assurance fund, under Sec. 32 of the Act, from the risk of uncertain title by such additional indemnity as in his discretion was necessary. In

the matter of the "Transfer of Land Statute," and In the matter of Charles Salter, 2 V. R. (L.) 113 243

(c) CAVEATS FORBIDDING THE BRINGING OF LAND UNDER THE ACT.

Caveator in possession not entitled to order restraining registrar.

Where the caveator is in possession and bases his title on adverse possession, he cannot get an order, under Sec. 24 of the "Transfer of Land Statute" (Victoria, No. 301), restraining the registrar from bringing the land under the Act. The caveator may remain in possession and successfully resist an action of ejectment. In re the "Transfer of Land Statute," Ex parte Brown, 5 V. L. R. (L.) 5..... 381

Overruled by Bethune v. Porteous, 14 A. L. T. 265 553

Onus probandi as between caveator in possession and applicant.

The applicant showed a complete documentary title, and proved that he was in possession within twenty years next before his application. Held, as between the applicant and the caveators in possession, that the onus was on the caveators to shew that the applicant's title had been defeated, i.e., that his entries on the land when vacant within the twenty years had been ineffective, in other words, had not been made animo possidendi, or had been made after his title had been extinguished. Solling v. Broughton, App. Cas. (1893) 556.... 72

Caveator's remedies.

The Court has jurisdiction, under Sec. 24, of the "Transfer of Land Statute" (Victoria, No. 301), to make an order restraining the Registrar of Titles from bringing land under the Act, although no suit or action has been instituted, where no other remedy is open to the caveator. Ex parte Gunn, 3 V. L. R. (L.) 36. 425

In Victoria, it was held that a Judge in Chambers had no jurisdiction upon summons to make an order under the "Transfer of Land Statute" (No. 301), Sec. 24, to restrain the

registrar from bringing land under the Act. The caveator must bring an action or file a bill. In re Power, 6 W. W & a'B. (L.) 81.... 361

But this was overruled in Ex parte Gunn, 3 V. L. R. (L.) 36 425

See also Ex parte Beissel, 3 V. L. R. (L.) 53.. 333

Lapse of caveat.

Section 24 of the "Transfer of Land Statute" (Victoria, No. 301), provides that a caveat shall be deemed to have lapsed unless the caveator, within the time limited for that purpose, shall have taken proceedings in a Court of competent jurisdiction to establish his title. Held, that this provision does not create a new jurisdiction in Courts of Equity, but directs such proceedings as would be appropriate, apart from the Act, to establish the rights of the caveator, and makes notice of such proceedings when served upon the registrar a stop to registration. Hodgson v. Hunter, 3 V. R. (E.) 61 203

May be waived by applicant's conduct.

Section 23 of the Real Property Act of New South Wales (26 Vic. No. 9), provided that after the expiration of three months from the lodging of the caveat, it shall be deemed to have lapsed, unless in the meantime proceedings be taken by the caveator to establish his rights. Upon such lapse the applicant is entitled to ask the Court for an order removing the caveat. The maxim, Qui libet potest renunciare juri pro se introducto, applies; therefore, it is competent for the applicant to waive the lapse of the caveat under Sec. 23, and such waiver may be by conduct. After such waiver, it is too late to apply for an order to remove the caveat on the ground that proceedings were not taken within the time prescribed. In a case where more than three months had elapsed since the lodging of the caveat, the applicant stated a case under the statute for the opinion of the Court, and obtained an order for the caveator to state and file a case in her behalf, which she did. The applicant did not further proceed with his application, but moved to have the caveat set aside upon the ground that the caveat had lapsed. Held, that the applicant had waived

the benefit of Sec. 23, by which the caveat had lapsed. For the steps taken by the applicant assumed and proceeded on the assumption of the continued existence of the caveat. It is a question of fact in each case whether there has been a waiver or not. Wilson v. McIntosh, 6 R. (February, 1894) 429 78

After lapse, no jurisdiction in Court to revive.

After a caveat has lapsed, the Court has no power to make an order, under Sec. 24 of the "Transfer of Land Statute" (Victoria, No. 301), restraining the registrar from bringing the land under the Act. In re the "Transfer of Land Statute" and caveat of Hannah Summers, Ex parte Aylwin, 4 V. L. R. (L.) 116.... 403

Removing caveat.

A caveat was lodged, under Sec. 22 of the "Transfer of Land Statute" (Victoria, No. 301), forbidding the bringing of the land under the statute. A rule nisi to remove the caveat was not properly served upon the caveator by leaving it at the address named in the caveat at a time when no person was present at the address to receive it. If the affidavit of service shows that mode of service, no counter affidavit is required denying knowledge of the service. An admission by the caveator that the rule nisi reached his hands two days before it was made absolute does not cure the defect. (There is a provision in Sec. 116 of the Act No. 301, which relates only to caveats lodged in respect of land already under the statute). In re the caveat of J. B. Slack, and the application of W. H. Winder, 1 V. L. R. (L.) 319 248

CERTIFICATES OF TITLE.

(a) CANCELLATION OF CERTIFICATES.

An applicant to bring land under the Victorian Statute (No. 301) obtained a certificate of title by representing that a person in possession was merely a trespasser. After becoming registered proprietor, the applicant brought an action of ejectment against the alleged trespasser, who established in his defence a title to the same lands by possession. He

then applied to the Court, and it was ordered that the proprietor deliver up the certificate to be cancelled. In re the "Transfer of Land Statute," Ex parte Rigby, 9 V. L. R. (L.), 417.. 459

Where a certificate was impeached for fraud, Held, the Court has no jurisdiction to order the cancellation of a certificate of title. The proper mode of giving relief from the inequitable effect of such a certificate is by ordering the registered proprietor to execute a transfer. [But Sec. 139 of the "Transfer of Land Statute" (Victoria, No. 301), was not referred to, and perhaps overlooked]. Gunn v. Harvey, 1 V. L. R. (E.) 111 294

Form of order made.

Section 139 of the "Transfer of Land Statute" (Victoria, No. 301), provides that upon recovery of land from the registered proprietor by any proceeding at law or in equity, it shall be lawful for the Court or a Judge to direct the registrar to cancel any certificate of title, and to substitute such certificate as the circumstances of the case may require. But where the owner of land, who had been deprived of it by the defendant having brought it under the Act, and having obtained a certificate of title in his own name, obtained judgment, the Court did not order the Registrar of Titles to cancel such certificate, for he was not made a party to the action; but ordered the defendant to give up possession of the land, with mesne profits for the time he had been in occupation; also to deliver up the duplicate certificate of title and to execute a transfer to the plaintiff. The defendant was not allowed the expense of bringing the land under the Act. Ogle v. Aedy, 13 V. L. R. 461 285

(b) RECTIFYING CERTIFICATES AND REGISTER.

Section 132 of the "Transfer of Land Statute" (Victoria, No. 301), provides for the cancelling or correcting of certificates issued in error. "What is the meaning of error? Not, in my opinion, a mistake of fact only, but also an error in law." Per Stawell, C.J., In re "Transfer of Land Statute," Ex parte Bond, 6 V. L. R. (L.) 458 257

The name of a registered owner having been removed in favour of a fictitious and non-existing transferee as the result of a forged transfer, a mortgage purporting to have been executed by such transferee was subsequently put upon the register by bona fide mortgagees. In a suit by the true owner against the registrar, the mortgagees and the perpetrator of the fraud, held, (a) that the plaintiff's name must be restored to the register; (b) that the mortgage was invalid, and did not in favour of the mortgagees constitute an incumbrance on the plaintiff's title; though under the Act (No. 301, Victoria) it would have that effect in favour of a bona fide registered transferee thereof. Gibbs v. Messer, A. C. (1891) 248 1

(c) RECALLING CERTIFICATE.

Upon application for mandamus to the registrar to give his reasons for refusing to call in a certificate of title, and to call in the said certificate of land under the Victorian Statute (No. 301), the application was refused on the ground that Sec. 132 of the Act provided for calling in certificates in case it shall appear to the satisfaction of the registrar that any certificate was issued in error, and it was not proved in this case that it so appeared to the satisfaction of the registrar. Re O'Connell and the "Transfer of Land Statute," 6 A. L. T. 85 523

(d) CONCLUSIVENESS OF CERTIFICATE.

General grounds for.

The main object of the Act (Victorian "Transfer of Land Statute"), and the legislative scheme for the attainment of that object, are equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage in the register, shall thereby acquire an indefeasible right, not-

withstanding the infirmity of his author's title. Lord Watson in Gibbs v. Messer, A. C. (1891), 248, 254 1

Crown bound.

Though not expressly declared to be bound, the Crown is bound by the provisions of the "Transfer of Land Statute" (Victoria, No. 301). Attorney-General v. Goldsbrough and others, 15 V. L. R. 638 402

Not conclusive as excluding easements.

Held, affirming judgment of the Supreme Court of Victoria (15 V. L. R. 615), that the omission on the appellant's and respondent's certificates of title to their respective lands under the "Transfer of Land Statute" to record the easement did not bar the respondent's claim or relieve the servient tenement of its liability. James v. Stevenson, A. C. (1893) 162 13

See infra, sub-title "Easements and registration thereof."

Conclusive if easement specified.

Where a right of way is specified in a certificate of title [issued under the "Transfer of Land Statute" (Victoria, No. 301),] of the servient tenement, the correctness of the certificate cannot be impugned in an action of trespass. Jones v. Park, 5 V. L. R. (L.) 167.. 421

Certificate is conclusive evidence of title.

An uncertificated insolvent became lessee of an allotment under the "Land Act, 1865" (Victoria). His official assignee was registered as the proprietor under the "Transfer of Land Statute" (No. 301), but was not registered under the "Land Act." The assignee transferred to B., who registered this transfer under both Acts, and procured a certificate of title. In ejectment by the registered transferee against the insolvent, where plaintiff proved these facts, held, that if plaintiff had relied on his certificate of title, he might have succeeded; but as he went outside the certificate, and thereby showed he had not the legal estate, he must be nonsuited. Miller v. Moresey, 2 V. R. (L.) 39 436

In a further proceeding in ejectment between the same parties, the plaintiff, who had obtained from the registrar a new certificate in substitution for the one produced in the former action, put in the new certificate and gave no other evidence. Upon motion for nonsuit, held, that the certificate was conclusive evidence that the person named in it is proprietor. It is not necessary to prove the preliminary steps taken to procure the certificate. Miller v. Moresey, 2 V. R. (L.) 193 438

If relied on as conclusive, certificate must be produced.

Section 47 of the "Land Transfer Statute" (Victoria, No. 301), provides that the certificate of title shall be conclusive evidence that the registered proprietor is seised or possessed of the estate or interests therein described. Where a certificate of title has been obtained, the proprietor must produce it in a suit in which he would rely upon it as conclusive. The Shamrock Company (registered) v. Farnsworth, 2 V. L. R. (E.) 165 176

Duplicate certificate is prima facie evidence of title.

A duplicate certificate of title under the Victorian Statute (No. 301) is admissible as prima facie evidence of title in ejectment. (Sed. qu. whether the words "every certificate of title issued," in Sec. 47, do not include the duplicate original certificate issued to the proprietor, and which therefore becomes under the section conclusive evidence that the person named in such certificate as the proprietor is seised or possessed of the estate or interest therein described). Wilkinson v. Brown, 1 V. R. (L.) 86 433

Exceptions to conclusiveness—Trusts.

Sections 49 and 50 of the "Transfer of Land Statute" (No. 301, Victoria), protect a purchaser from the registered proprietor against incumbrances and trusts, but does not absolve him from the obligation of performing an agreement into which he has entered, or deprive the Court of the power to enforce such performance. So where G. sold to C. a piece of land, and the agreement was too uncertain in the description of the land to have been enforced,

but C. paid the purchase money, entered into possession and made improvements; G. afterwards sold to S. the balance of the land, but the transfer to S. included the piece in possession of C.; S. had notice of C.'s rights, and afterwards gave a document to C., that he had sold to C. the same parcel for the original consideration paid by C. to G.; it was held, that whatever the document signed by S. ought to be termed, it amounted to a recognition by S. that he was a trustee for C. of the parcel occupied by C., and that this trust could be enforced. Cunningham v. Gundry, 2 V. L. R. (E.) 197 161

Volunteer taking without notice of trust.

The protection of Sec. 50 of the Statute of Victoria (No. 301) does not extend to the case of a transfer without notice of the trust without consideration at the time of the transfer, or if there be no previous legal obligation to transfer. So in a case where an administratrix, the registered proprietor of the intestate's land, before her remarriage, by an agreement void under the Statute of Frauds, agreed to transfer to her proposed husband, who did not know that she held as administratrix, land purchased by her with money raised by mortgage of the trust estate, and therefore impressed with the same trust, after marriage the land was transferred, and the husband became registered as proprietor. In a suit for administration of the intestate's estate, it was held, that as the void antenuptial agreement formed no valuable consideration for the transfer, that the transferee was not protected by Sec. 50 of No. 301. Crow v. Campbell, 10 V. L. R. (E.) 186..... 87

Fraud.

Section 153 of the "Transfer of Land Statute" (Victoria, No. 301), provides that a certificate of title procured by fraud shall be void as against all parties to the fraud. Held, that the mere fact that the plaintiff, in his application to bring land under the Act, stated that the land and the adjacent ground were unoccupied does

not make the certificate void; there must be a guilty intention. Wiggins v. Hammill, 4 V. L. R. (L.) 63..... 363

Voluntary transactions.

A voluntary settlement of land under the "Transfer of Land Statute" (Victoria, No. 301), is void under the 27 Eliz. Cap. 4, as against a subsequent purchaser, with notice, from the settlor, notwithstanding that the volunteer holds a certificate of title as registered proprietor under the Act; and such subsequent purchaser may maintain an action for specific performance against the settlor and the registered proprietor. "The language of protection to proprietors was intended for real purchasers under the Act and persons dealing with them, not to sons taking presents from their fathers. To hold otherwise would make the Act protect cases of real, as well as constructive, fraud," Molesworth, J. Colechin v. Wade, 3 V. L. R. (E.) 266 278

Adverse possession.

Section 49 of the "Transfer of Land Statute" (Victoria, No. 301), provides that the land included in any certificate of title shall be deemed subject to any right subsisting under any adverse possession of such land. Held, per Fellows, J., "adverse possession" means possession in fact as ostensible owner, as distinguished from clandestine trespass; the words have not the technical meaning put upon them in the old law. The only inquiry is as to the fact of possession, and not as to its nature. When the wrong man is in and the right man is out of possession, the possession is "adverse" within the meaning of the Act. Per Stephen, J. To raise a presumption of "rights acquired" so as to invalidate a certificate of title, there must have been a possession incompatible with a freehold in the claimant, and the acts of ownership must amount to evidence of such a possession. Staunton v. Brown, 1 V. L. R. (L.) 150 213

Leases.

Section 49 of the Victorian Statute (No. 301) provides that the land included in the certi-

ficate of title shall be deemed subject, where the possession is not adverse, to the interest of any tenant of the land, notwithstanding the same may not be specially notified as an encumbrance on such certificate. "Tenant" includes every tenant who is in actual occupation and holds under some landlord; every interest in the land of such a tenant which grows out of, and is not disseverable from, his right to continue in occupation as a tenant, is protected by the terms of this provision against the claim of a proprietor under a certificate of title. Sandhurst Mutual Permanent Investment Building Society v. Gissing, 15 V. L. R. 329; 11 A. L. T. 62.... 466

Tenants' rights.

Section 49 of the "Transfer of Land Statute" (Victoria, No. 301), provides that a certificate of title shall be deemed to be subject to any rights subsisting under any adverse possession, and also when the possession is not adverse to the interest of any tenant of the land. "The second exceptional provision relates to the interest of any tenant of the land —that is all interests, not merely the tenant interests." "The 49th section saves all the tenant's rights. One in possession as a tenant at will does not come under the protection of the provision for adverse possession, but would have, among his other occupier's rights, a right to rely on possession under the "Statute of Limitations." Molesworth, J., in Robertson v. Keith, 1 V. R. (E.) 11..... 366

Tenant at will.

Tenancy at will is an interest within Sec. 49 of the "Transfer of Land Statute" (Victoria, No. 301); therefore, where B. entered into possession of land under a contract made with a person from whom those seeking to eject him themselves derived title, it was held, that before they could maintain ejectment against R. they must demand possession from him. Colonial Bank v. Roach, 1 V. R. (L.) 165..... 374

in writing to be registered as proprietor" is given by express words, and it is to them only that this form of expression is applied in the Act. Except in these cases, and in the additional case of a sale under a writ of fi. fa. issued out of the Supreme Court, Sec. 106, application for registration must be made by the registered proprietor. In re "Transfer of Land Statute," Ex parte Davies and Inman, 11 V. L. R. 780..... 273

(b) PROVISIONS AS TO FRAUD.

Nominal consideration not badge of fraud.

"The nominal consideration of £5 I consider immaterial. It was introduced, I believe, according to an old habit of conveyancers in voluntary transactions, and is not, I think, a badge of fraud." Molesworth, J., in Crow v. Campbell, 10 V. L. R. (E.) 186, 194. 87

Example of fraud.

"I would instance as to what might be deemed fraud under the 'Transfer of Land Statute' (Victoria, No. 301), collusion between proprietor, vendor, and vendee, to defeat an equitable interest, or means taken by the vendee to induce a person having equitable interests not to enforce his rights or lodge a caveat." Per Molesworth, J., in Robertson v. Keith, 1 V. R. (E.) 11 366

Definition of fraud.

"Fraud, in Sec. 74 of the 'Transfer of Land Act, 1890,' means moral turpitude, actual dishonest dealing, and does not include what is known as 'constructive fraud.'" Per Williams, J. "The fraud referred to in the 'Transfer of Land Act, 1890,' is actual moral depravity, some intentional wrong-doing, a wilful violation of the common rules of right and wrong, and not constructive fraud." Per Hood, J. Gregory et al. v. Alger et al., 15 A. L. T. 22.... 532

"Fraud" means "fraud" on the part of either transferor or transferee.

Section 50 of the "Victorian Land Transfer Statute" (No. 301) commences with the words "except in the case of fraud," and as

that section is to a great extent restrictive of the rights of persons at law and in equity, it should be construed strictly, and the exception liberally. The word "fraud" there means fraud on the part of either party, and not necessarily of both. It was not intended that where fraud was committed by the purchaser himself he should be protected. Stawell, C.J., in Chomley v. Firebrace, 5 V. L. R. (E.) 57 98

(c) NOTICE.

Statute protects against constructive, not actual notice.

The "Land Transfer Statute," Victoria (No. 301), protects against all constructive notices, but does not protect a purchaser having actual notice before the contract is made that the proprietor has acquired his title by fraud. The Colonial Bank of Australasia v. Pie, 6 V. L. R. (E.) 186 122

Notice of writ lodged for execution.

Actual or constructive notice of a writ of fieri facias lodged for execution under Victorian Statute (No. 301, s. 106), but of which a copy, accompanied by a statement of the lands sought to be affected thereby, has not been served upon the registrar, does not invalidate a transfer by the judgment debtor to a purchaser for value. The Registrar of Titles v. Paterson, L. R. 2 App. Cas. 110..... 58

Principle of notice not abolished.

The "Transfer of Land Statute" (Victoria, No. 301), was not intended to abolish the principle of notice. Notice of an equitable interest in another, given to a purchaser of land under the Act at any time before he has completed his title by getting his transfer registered, is sufficient to entitle the person in whom the equitable interest is to prevent the issue of a clear certificate of title to such purchaser. Cowell v. Stacey, 13 V. L. R. 80..... 355

Limitation of principle of notice.

Section 50 of the "Transfer of Land Statute" (Victoria, No. 301), protects from notice, actual

or constructive, the purchaser from the registered proprietor, except in case of fraud. The exception is not to be construed to extend to the case of a transferee with constructive knowledge of the fraud of the transferor in acquiring title. So where A. borrowed money of B., and B. procured A. to execute a transfer pretending it was only a security, and had himself registered as proprietor, and then mortgaged to C., and the premises were in the occupation of a weekly tenant of A. throughout; held, that inquiry of the tenant would have disclosed that the tenant was paying rent to A., and there was therefore constructive notice to C. of A.'s claims, still the section protected C. Chomley v. Firebrace, 5 V. L. R. (E.) 57, distinguished. Cullen v. Thompson, 5 V. L. R. (E.) 147 322

(*d*) TRANSFEREES UNDER SHERIFF'S SALES.

A purchase at sheriff's sale of the interest of a registered proprietor, though protected by transfer, held void as against the plaintiff, a prior purchaser from the registered proprietor, on the ground of legal fraud; but good as against the registered proprietor's right and interest on unpaid purchase money. Brew v. Jones, 2 V. R. (E) 20 376

Purchaser from sheriff and unregistered equitable mortgagee.

Under the 106th Section of the "Transfer of Land Statute" (Victoria, No. 301), a purchaser of land does not become the transferee, nor is he deemed the proprietor thereof until the transfer has been received and entered by the registrar in the register book. The sale under the writ itself does not affect the right of any purchaser for valuable consideration (including an equitable mortgagee) whose right has accrued before service of the copy of the writ upon the registrar, even though such purchaser had actual or constructive notice of the lodgment of the writ for execution. Against such a purchaser the purchaser from the sheriff acquires no right until he gets his transfer completed by registration and becomes the transferee and proprietor; and even

then there may be cases in which his title to the land may be impugned, and he may be ordered to reconvey to an earlier purchaser, of whose charge or encumbrance he has had notice. The purchaser from the sheriff, in fact, only buys a charge upon the judgment debtor's interest in the land, and that charge is clearly subject to an earlier equitable or legal charge. It is by virtue of the language of the statute that the moment the transfer from the sheriff to the purchaser has been entered on the register, the purchaser becomes the transferee, and is to be deemed the proprietor thereof. National Bank of Australasia v. Morrow, 13 V. L. R. 2 306

Purchaser from sheriff and purchaser from judgment debtor—Priorities.

The Victorian Statute (No. 301, s. 106), provides that no mere registration of an execution shall bind or charge the land, but that the registrar, on being served with a copy of the writ of fieri facias, accompanied by a statement specifying the land to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the register book; and when a sale of the land is made under the writ, the registrar, on receiving a transfer thereof, shall enter it in the register book, whereupon the purchaser from the sheriff becomes the registered proprietor. Until the registrar is so served with copy of writ and statement, even though the writ be actually lodged for execution and the purchaser from the judgment debtor have actual or constructive notice of the writ, such purchaser for value, if his transfer be duly registered, is entitled to a certificate of title free from any claim by the judgment creditor. The Registrar of Titles v. Paterson, L. R. 2 App. Cas. 110 58

Transferee from judgment debtor after expiry of original writ of fieri facias (Victoria).

The judgment creditor must proceed within the time limited by the statute by actual sale of the land; nor will the issue of an alias writ and service of a copy before expiry of the original writ upon the registrar, with a state-

ment of the same lands to be affected thereby as by the original writ, render invalid a transfer by the judgment debtor to a purchaser for value with notice, actual or constructive, that the judgment debt remains unsatisfied. The Registrar of Titles v. Paterson, L. R. 2 App. Cas. 110 58

Transfer by judgment debtor subject to writ of fieri facias expiring without sale made thereunder.

There is nothing in the Statute (Victoria, No. 301), to prevent a judgment debtor from making a contract for the transfer of his land to a purchaser for value, subject to the rights which the Section (106) gives to an execution creditor, or to a possible purchaser through the sheriff. Such a contract can be perfected only by due registration, and therefore remains defeasible until the writ is withdrawn or satisfied, or the term of three months (provided by Sec. 106) from the day on which the copy was duly served upon the registrar has expired. The Registrar of Titles v. Paterson, L. R. 2 App. Cas. 110 58

(e) TRANSFERS BY INSOLVENTS.

After assignee has lodged caution.

Where the assignee of an insolvent debtor has lodged a caution against any dealing with land forming part of such estate under the "Transfer of Land Act, 1890" (Victoria), the registrar is bound to ignore all dealings by the insolvent proprietor. In re Palmateer, 16 V. L. R. 793 545

Official assignee not a purchaser for value.

The effect of Sec. 106 of the "Transfer of Land Statute" (Victoria, No. 301), is to avoid the sale under the writ of fieri facias as against a subsequent purchaser for value from the execution debtor, unless the transfer be left for registry within three months from the date of the service of a copy of the writ upon the registrar. The sale is not avoided as against the execution debtor himself. An official assignee of an execution debtor is not a purchaser for value within the meaning of

the section. The United Hand-in-Hand Co. v. National Bank [2 V. L. R. (E.) 206], followed. Giles v. Lesser, 5 V. L. R. (E.) 38 329

REGISTRATION, EFFECT OF.

Effect of instrument before registration.

Section 42 of the "Victorian Statute" (No. 301) enacts that no instrument until registered shall be effectual to pass any estate or interest in any land under the Act, or to render such land liable to any mortgage or charge. While the particular effect of registration of an instrument is the conveying, passing or conferring estates, interests and rights in the land, the statute does not negative or withhold from the instrument before registration any other effect. Unregistered instruments are effectual as contracts between the parties to them, or as securities springing from the contract from the date of signing; and acts done by the parties under and in accordance with the contracts before registration may, as between the parties, be valid and effectual. Mathieson v. The Mercantile, Finance and Agency Company, Limited, 17 V. L. R. 271... 478

Although an unregistered transfer is not effectual to pass any interest in the land under Sec. 39 of Act. 22 of 1861 (South Australia), yet it is effectual to pass to the transferee the equitable right which his transferor had to set aside a certificate of title relating thereto which has been obtained by fraud. McEllister v. Biggs, L. R. 8 App. Cas. 314 29

Section 36 of the "Transfer of Land Statute" (Victoria, No. 301), enacts that the person named in any grant registered under the Act as the grantee or proprietor, or having any estate or interest or power, shall be deemed and taken to be the duly registered proprietor thereof. So in a case where a power of attorney did not authorize the execution by the attorney of a creation of easement under the Act over land of which the principal was registered proprietor; but the attorney had executed such instrument, and the same had

been registered; held, that the grantee, in the absence of fraud, became the registered proprietor of the easement of right of way mentioned in the instrument, and entitled, by virtue of Secs. 36 and 49 of the Act, to exercise the rights of a registered proprietor. For inasmuch as the instrument purported to transfer and grant an incorporeal hereditament, it was an "instrument purporting to affect land" within the meaning of Sec. 36. Magor v. Donald, 13 V. L. R. 255 266

REGISTRAR.

Registrar has judicial functions.

The registrar is not merely to register instruments, whether valid or invalid. The "Transfer of Land Statute" (Victoria, No. 301), imposes on the registrar the duty of examining into their validity, and of deciding whether an applicant is entitled to registration, and from his decision there lies an appeal to the Supreme Court, and thence to the Privy Council. In re "Transfer of Land Statute," Ex parte Bond, 6 V. L. R. (L.) 458 257

Refusal to register transfer—Mandamus.

B. was registered proprietor of leaseholds; C. lodged a caveat forbidding registration of any change of proprietorship. The caveat lapsed. A. presented for registration a transfer of the lease from B. C. commenced an action for specific performance against B. and the Registrar of Titles. The registrar refused to register the transfer on the ground that he was made a party to the action by C. A. made application for mandamus to compel the registrar to register the transfer. Held, that the ground of refusal was not sufficient, and the rule was made absolute, with costs against the registrar. In re "Transfer of Land Act, 1890," Ex parte Clark, 17 V. L. R. 82 118

Registrar to give grounds of refusal.

Section 135 of the "Transfer of Land Statute" (Victoria, No. 301), provides that upon the refusal of the registrar to register, the applicant, if dissatisfied, may summon the registrar to set forth in writing under his hands the grounds of his refusal, that is, his reasons in point of law or in point of fact. In re the "Transfer of Land Statute," Ex parte Bond, 6 V. L. R. (L.) 458 257

Application to restrain must be on notice.

An application to restrain the Registrar of Titles from registering a transfer of land under the Victorian Statute (No. 301) should be made upon notice, and not ex parte. In re the "Transfer of Land Statute," Ex parte Peck, 10 V. L. R. 328 525

Registration of writ of fi. fa.

Quaere—Whether the Registrar of Titles can enter on the register book a copy of a fieri facias lodged under Sec. 106 of the "Transfer of Land Statute" (Victoria, No. 301), when the estate or interest of the execution debtor nowhere appears in that book, as where it is merely an equity of redemption under a deed of defeasance executed by a mortgagee who has taken an absolute transfer of the land as a security. Watson v. The Royal Permanent Building Society, 14 V. L. R. 283..... 185

CAVEATS AGAINST DEALING BY REGISTERED PROPRIETOR.

Assignee of insolvent may lodge caveat.

The assignee of an insolvent may lodge a caveat in the Office of Titles against dealings with the land under the "Transfer of Land Act, 1890" (Victoria), by the insolvent proprietor, and the assignee may himself become registered as the proprietor. In re Palmateer, 16 V. L. R. 793 545

Next of kin of lunatic, no right to lodge caveat.

The lunatic was resident in England. His committee had power, conferred by the Court in England, to sell the property of the lunatic in Victoria. The next of kin of the lunatic lodged a caveat to prevent any dealings in respect of the land. The attorney under power of the committee applied by way of motion to have the caveat removed. Held, that the attorney under power was entitled to make the application, and that the next of kin had no power to lodge the caveat. In re Annand, 17 V. L. R. 108 83

Effect of caveat on title.

The lodging of a caveat against registration of any transfer of land under the "Transfer of Land Statute" (Victoria, No. 301), only throws a cloud upon the title of the registered proprietor, and does not amount to such evidence of an absolute want of title as to induce the Court to refuse a purchaser specific performance of a contract of sale on the ground that the vendor has no title. Taylor v. The Land Mortgage Bank of Victoria, Limited, 12 V. L. R. 748 168

Form of order delaying transfer.

Section 117 of the Victorian Statute (No. 301), enacts that a caveat lodged against a proprietor shall be deemed to have lapsed upon the expiration of fourteen days after notice to the caveator that the proprietor has applied for the registration of a transfer. Before the expiration of the fourteen days, upon the caveator appearing before a Judge and giving such security as the Judge may think fit, the Judge may direct the registrar to delay registering the transfer. In this case the order so made did not show upon the face of it, nor did it appear upon the affidavits upon which the order was drawn up, that the order had been made within fourteen days after notice to the caveator. Held, that the order was bad and must be set aside. In the matter of the "Transfer of Land Statute" and In the matter of Henry George Wise, 2 V. R. (L.) 111 434

Proceedings to remove caveat.

On an application to remove a caveat, it is not necessary that the summons should be signed by the Judge in Chambers; it is sufficient if it be signed by his associate. It is not necessary that an affidavit in support of such summons should be filed upon the issue of the summons, and it should be filed within a reasonable time before the return of the summons. In re Wall, Ex parte Pearson, 13 V. L. R. 484..... 373

Summary removal of caveat by Court.

Section 117 of the Victorian Statute (No. 301) provides that the Supreme Court or a Judge, before whom application is made to have a caveat removed, may, upon proof that the caveator has been summoned, make such order, ex parte or otherwise, as to such Court or Judge may seem fit. On application under this section by the registered proprietor to have a caveat removed, the Court, where there is a conflict of testimony, will not order the caveat to be removed, but may order that such caveat shall be removed unless steps are taken to establish the caveator's title within a certain time. In the matter of the "Transfer of Land Statute," Ex parte Vincent, 12 V. L. R. 566 470

Rights of unregistered transferee as to removing caveat.

An unregistered transferee is not entitled, under Sec. 117 of the "Transfer of Land Statute" (Victoria, No. 301), to be notified of a caveat by the registrar, or to summon the caveator to show cause why the caveat should not be removed. The policy of the enactment appears to be that the registrar shall not be brought into contact with or run the risk of incurring liabilities to a stranger who may choose to lodge a caveat, and shall be entitled, in all dealings with land brought under the operation of the Act, to look to and deal with the registered proprietor alone of that land. In re the "Transfer of Land Statute," Ex parte Davies v. Inman, 11 V. L. R. 780..... 273

Caveat, removal of.

An application by a registered proprietor of land under the Victorian Statute (No. 1149)

for the removal of a caveat, on the ground that it interfered with some future intended dealings with the land, will not be entertained by the Court when it is admitted or shown that the caveat has been lodged in accordance with the Act, or by a person entitled to lodge it. In such a case the registered proprietor must proceed in accordance with the provisions of Sec. 145 of the "Transfer of Land Act, 1890." In re the caveats of Talbot and Kelly, 13 A. L. T. 270 520

Costs.

The question of costs is entirely within the discretion of the Court, and the Court will not limit them to County Court costs in an action in support of a caveat under the "Transfer of Land Statute" (No. 301 of Victoria), even assuming that the County Court would have had jurisdiction to hear the case. McCluskey v. Frame, 13 V. L. R. 93 440

Under Section 117 of the Victorian Statute (No. 301), where a party seeks to remove a caveat, the proper course to adopt is to obtain a summons from a Judge in Chambers, returnable before the full Court, calling upon the caveator to show cause why the caveat should not be removed. A Judge in Chambers has no jurisdiction to entertain the matter, and the rule "no jurisdiction no costs" prevails. Ex parte Goldsworthy, 8 A. L. T. 181 519

EASEMENTS.

Creation of, by registration.

Where a power of attorney did not authorize the execution by the attorney of a creation of easement under the Act over lands of which the principal was registered proprietor, but the attorney had executed such instrument, and the same had been registered: Held, that as the instrument purported to transfer or grant an incorporeal hereditament, it was an "instrument purporting to affect land" within the meaning of Sec. 36 of the "Transfer of Land

Statute" (Victoria, No. 301), and therefore the grantee, in the absence of fraud, became the registered proprietor of the right of way mentioned in the instrument, and entitled to exercise the rights of a registered proprietor. Magor v. Donald, 13 V. L. R. 255 266

Easements appurtenant.

In bringing under the "Transfer of Land Statute" (Victoria, No. 301), land with an easement appurtenant, the applicant cannot have such easement inserted in his certificate of title against the will of the proprietor of the servient tenement, though the latter is already registered under the Act. In re the "Transfer of Land Statute," Ex parte Beissel, 5 V. L. R. (L.) 53..... 333

(This decision has never been considered binding in Victoria, and is ignored by the Office of Titles. The right to enter easements on the certificate of either the dominant or servient tenement was tacitly recognized in the later case of Jones v. Park, 5 V. L. R. (L.) 167, note by a'Beckett).

Easements not appurtenant.

The owner of certain land granted by deed to an adjoining owner a right of way over a certain portion of his land. Upon application to register the grantor as proprietor under the "Transfer of Land Statute" (Victoria, No. 301), the grantee lodged a caveat in respect of his right of way. Held, that only easements appurtenant to the land registered can be entered upon the register; and that this was not such an easement, but a right of way in gross. In re "Transfer of Land Statute," Ex parte Johnson, In re Whyte, 5 W. W. & a'B. (L.) 55 343

Easements over land not under the Act can not be registered (Victoria).

It is not allowable to place on the register or in the certificate of title any easement over, upon, or affecting land which has not been brought under the Act. Sec. 64 of the "Victorian Land Transfer Statute" (No. 301), prescribes that when any easement is created

over or upon or affecting any land under the operation of the Act, a memorial is to be entered upon the folium constituting the title to such land, or, in other words, a blot is to be made in the register on the title to the servient tenement. There is no provision for showing on the title of the dominant tenement any easement which may be appurtenant to it, though the use of the word "land" will, by virtue of the interpretation clause, carry with it any easement which its owner can be proved by evidence, external to the register, to be entitled to enjoy in respect of his ownership of such land. In re the "Transfer of Land Statute," Ex parte Cunningham, 3 V. L. R. (L.) 199..... 138

(To remedy this defect, pointed out to exist in Act No. 301, Act No. 610 was passed, for the effect of which vide Ex parte Beissel, 5 V. L. R. (L.) 53).

Right of way, not set out in certificates of title.

Where the certificates of title issued to adjoining proprietors were silent as to any right of way, it was contended that the legal effect of the certificates was to extinguish the right of way. Held, affirming judgment of Supreme Court of Victoria (15 V. L. R. 615), untenable. For Sec. 49 of No. 301 (Transfer of Land Statute) provides that land included in any certificate of title shall be deemed to be subject to any easement subsisting over it. The amending Act, No. 610, Sec. 2, makes a certificate of title which certifies that the person named therein is entitled to an easement conclusive evidence that he is so entitled; but it does not make such certificate the only evidence admissible. The 41st section of the subsequent amending Act, No. 872, requires the registrar to specify upon the certificate, as an encumbrance affecting the land included in it, any existing easement affecting the same which shall appear to have been created by deed or writing; but the omission of the registrar to enter the easement as an incumbrance on the certificate of the servient tenement, under this provision, would not relieve the servient of its liability. In like manner, the omission of the registrar to state on the certificate

granted to the owner of the dominant tenement the existence of the right of way claimed is no bar to that claim. James v. Stevenson, App. Cas. (1893) 162..... 13

LEASES.

Tenant at will—Ejectment.

When R. had entered into possession of land, under a contract made with a person from whom those seeking to eject him themselves derived title, held, that before they could maintain ejectment R. was entitled to a demand of possession. A tenancy at will is "an interest," within Sec. 49 of the "Transfer of Land Statute." Colonial Bank v. Roach, 1 V. R. (L.) 165..... 374

The Victorian Statute (No. 301), Sec. 49, protects the interest of any tenant who is in actual occupation and holds under some landlord at the time the land is brought under the statute. "Tenant" is wider in meaning, therefore, than "lessee." Sandhurst Permanent Investment Building Society v. Gissing, 15 V. L. R. 329, 11 A. L. T. 62..... 466

Lessee estopped by terms of his lease.

A mining lease under the "Mining Statute, 1865" (Victoria, No. 291), for fifteen years and registered under the "Transfer of Land Statute" (Victoria, No. 301), contained the following proviso: "If there shall be a breach of covenant (on the part of the lessee) these presents shall be voidable at the will of the Governor-in-Council; and in case the Governor-in-Council shall declare these presents void, the term shall cease and the declaration be conclusive evidence of breach in all Courts." Held, that the lessee executing such a lease was bound by the proviso and estopped from objecting to it, and that his term was effectually determined by such declaration without notice to him, or evidence of any breach of covenants. Matt v. Peel, 2 V. R. (M.) 27 197

Use and occupation.

A demise of lands, under the Victorian Statute (No. 1149 of 1890), for a term of years, contained a covenant that the lessee would not underlet or part with the possession of the premises without first obtaining the lessor's consent in writing, and if the lessee failed to perform the covenant that lessor might enter and expel lessees and all other occupiers. Lessee did sublet without consent of lessor; the subtenants entered into possession, but refused to pay the rent on the ground that, as the consent of the lessor had not been obtained, the sublease could not be registered. The lessee brought action on the covenant in the sublease and in the alternative for use and occupation. Held, that the lessee could recover for use and occupation at the rate of the rent reserved. Munro & Baillieu v. Adams, 17 V. L. R. 703..... 449

Laches of tenant in asserting right.

It is not recognized as a principle of law that mere negligence can deprive a tenant of his statutory right to the protection of his interest against a registered proprietor. Sandhurst Permanent Investment Building Society v. Gissing, 15 V. L. R. 329..... 466

MORTGAGES.

Attestation.

The manager of a bank, a justice of the peace, is not incapacitated from acting as attesting witness to the execution of a mortgage, under the "Transfer of Land Statute" (Victoria, No. 301), to his bank. The Bank of Victoria v. McMichael, 8 V. L. R. (L.) 11..... 406

Obligation to particular user of land.

O., the registered proprietor of a parcel of land under the "Transfer of Land Statute" (Victoria, No. 301), sold the same to the municipality; a term of the agreement for sale was that the land sold should at all times thereafter be maintained and used as a site for municipal chambers and offices, to be built to

the satisfaction of the vendor. Semble (Molesworth, J.), that the obligation to constantly use the land described in the certificate in a particular manner may be set out in the certificate as an incumbrance. The Mayor and Cor. of Brunswick v. Dawson, 5 V. L. R. (E.) 2 179

Mortgage by deposit.

A certificate of title under the "Victorian Statute" (No. 301), and a transfer by the registered proprietor to A. for a nominal consideration, were lodged by A. with a bank as security for an overdraft, without the bank having notice of any claim to the land by any person other than A. The transfer was not registered. In an action by the registered proprietor for the delivery up of the certificate and transfer, held, that the bank was not entitled to hold the land as a security as against the registered proprietor. Plumpton v. Plumpton, 11 V. L. R. 733 495

Equitable mortgage.

A person depositing as a security a certificate of title, under the "Victorian Statute" (No. 301), in the name of a third party, gives to the depositee only such right as the depositor has against the registered proprietor. Plumpton v. Plumpton, 11 V. L. R. 733..... 495

Certificate, custody of.

Cases as to allowing title deeds to be in the hands of an owner, instead of an incumbrancer, and thereby enabling the owner to conceal the fact of an incumbrance, are not applicable to the custody of certificates of title. Dictum of Molesworth, J., in Plumpton v. Plumpton, 11 V. L. R. 733 495

Mortgage by way of absolute transfer and deed of defeasance.

S., being the registered proprietor of a parcel of land under the "Land Transfer Statute" (Victoria, No. 301), borrowed money from a building society. Instead of a mortgage under the statute, S. executed a transfer absolute in form of the land to the society, and the society executed a deed of defeasance, which stated that the transfer was given by way of mort-

gage only, and that when the principal advanced and interest had been repaid the society would re-transfer the land to the borrower. The transfer was registered and a certificate of title issued to the society; the deed of defeasance was not registered. Held, that such creation of a quasi equity of redemption in land under the Act, though opposed to the policy and intention of the Legislature, was not illegal. Watson v. The Royal Permanent Building Society, 14 V. L. R. 283 185

Mortgage by administrator.

The administratrix mortgaged land, part of the estate of which she was registered proprietor under the "Victorian Transfer of Land Act, 1890," to B. to secure the payment of £1,000 owing by her to B. At the time B. took the mortgage he knew that she was administratrix, and that the land mortgaged formed part of the intestate's estate. Held (a'Beckett dissenting), that B.'s title was not acquired by fraud under the meaning of the "Transfer of Land Act, 1890," and therefore it could not be defeated. Gregory et al. v. Alger et al., 15 A. L. T. 22..... 532

Transferee of mortgagor not personally liable.

Section 90 of the "Transfer of Land Statute" (Victoria, No. 301), does not create a new liability upon mortgages under the Act, but makes the transferee liable to covenants running with the land. The estate of the borrower is liable in the hands of his heirs, executors, administrators and transferees, but the statute does not make them personally responsible. Therefore, the purchaser of a mortgagor's interest is not personally liable to the mortgagee to pay the mortgage debt. Australian Deposit and Mortgage Bank v. Lord, 2 V. L. R. (L.) 31 388

Mortgagor's tenant.

The possession of a tenant of a mortgagor under a tenancy created prior to the mortgage is not adverse to the title of the mortgagee. The interest of the lessee is that of a tenant where possession is not adverse; he is not obliged to attorn voluntarily to the mort-

gagee, and cannot be ejected without demand of possession sufficient to put an end to the tenancy. Tenants' rights are saved under Sec. 49 of the "Transfer of Land Statute" (Victoria, No. 301). The Colonial Bank of Australasia v. Rabbage, 5 V. L. R. (L.) 462..... 418

The mortgagee, the mortgage being under the "Transfer of Land Statute" (Victoria, No. 301), has no action qua mortgagee against a tenant of the mortgagor let in subsequently to the mortgage. Nor can the mortgagee, before he has entered into possession, maintain an action for use and occupation against a person let into possession by the mortgagor after the date of the mortgage. Louch v. Ball, 5 V. L. R. (L.) 157..... 429

Mortgagor's right to quiet enjoyment.

Section 93 of the "Transfer of Land Statute" (Victoria, No. 301), confers on a first mortgagee under the statute, in addition to the rights and powers given to him by the sections 84 to 91, the same rights and remedies to which he would have been entitled as owner of the legal estate under the old law, coupled only with a right in the mortgagee of quiet enjoyment until default. Unless this right amounts to a redemise to the mortgagor, the mortgagor is only a tenant at sufferance, and may be ejected by the mortgagee without any demand having been made for payment. The Commercial Bank v. Breen, 15 V. L. R. 572.. 407

If no time is fixed for payment of the mortgage money in a mortgage under the "Transfer of Land Statute" (Victoria, No. 301), there is no redemise, and the mortgagor has only a right of action for breach of his right to quiet enjoyment. The Commercial Bank v. Breen, 15 V. L. R. 572 407

Rights of mortgagor, how extinguished.

Where a mortgage is made under and subject to the provisions of the Act No. 301, the only ways in which the mortgagee could extinguish the rights of the mortgagor were (a) foreclosure under 31 Vic. No. 317 (Victoria), being the amended provision as to foreclosure under the Act; and (b) by a sale under the 84th, 85th

and 87th sections of the Act. The 84th section provides that if the mortgagor shall make default in payment of the principal sum or interest, and such default shall be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee may serve on the mortgagor notice in writing to pay the money owing on the mortgage. The 85th section provides that if such default continue for one month after the service of such notice, or for such other period in such mortgage for that purpose fixed, the mortgagee may sell the land. The 87th section provides that upon the registration of any transfer by a mortgagee for the purpose of such sale, the estate and interest of the mortgagor at the time of the registration of the mortgage shall pass to and vest in the purchaser discharged from liability on account of the mortgage. National Bank of Australasia v. The United Hand-in-Hand, etc., Co., L. R. 4 A. C. 391 33

Mortgagee must produce certificate to allow transfer to be registered.

Mortgagees held the certificate of title to the mortgaged land under a proviso in the mortgage. Upon transfer by the mortgagor they refused to produce the certificate of title for the transfer to be endorsed thereon. Held, under Sec. 134 of the "Transfer of Land Act, 1890" (Victoria, No. 1149), that, although there had been default according to the terms of the mortgage, that the certificate must be produced. In the matter of the "Transfer of Land Act, 1890," and In re Armitage, Ex parte Andrews, 17 V. L. R. 77 393

Defect in notice to mortgagor.

It is the right of the mortgagor, under Secs. 84 and 85 of the "Victorian Land Transfer Statute" (No. 301) to have a notice of demand served upon him after he is in default, as a necessary preliminary to a sale by the mortgagee under the statutory power. Upon an application to complete the title of the purchaser by registration under the 87th section, an objection on the ground of the failure to serve a proper notice of demand can be

taken by the registrar. Campbell v. Commercial Bank of Sydney, referred to. National Bank of Australasia v. The United Hand-in-Hand, etc., Co., L. R. 4 A. C. 391 33

Default and notice of sale before registration.

A mortgage in the form provided by the Victorian Statute (No. 301) contained a covenant that, in case default should be made in payment of any of the moneys expressed, or intended to be thereby secured, and such default should be continued for the space of three days, then all the moneys intended to be thereby secured should immediately become payable and recoverable, and it should be lawful for the mortgagee to serve on the mortgagor the notice provided by the Act; and on such default in payment continuing for the further space of three days after the service of such notice, it should be lawful for the mortgagee to exercise the power of sale mentioned in Sec. 85 of the Act. The mortgage was not registered for some time after the execution, and in the meantime default in payment was made and continued, and a demand of payment and notice of intention to exercise the power of sale were given. Held, that the demand of payment and notice of sale before registration of the mortgage was valid and effectual to authorize a sale before registration. Mathieson v. The Mercantile, Finance and Agency Company, Limited, 17 V. L. R. 271..... 478

Mortgage payable on demand — Notice necessary to sale by mortgagee.

A mortgage, in the form of the 12th schedule to the "Land Transfer Statute" (Victoria, No. 301), fixed no time for the repayment of the sum secured, but contained a power of sale, which the mortgagee was to be at liberty to exercise if the mortgagor should make default in payment after service upon him of a demand in writing. Sec. 84 of No. 301 provides that if the mortgagor shall make default in payment of the principal sum or interest, and such default shall be continued for one month, or for such other period of time as may by the mortgage be expressly fixed, the mortgagee

may serve on the mortgagor notice in writing to pay the money owing on the mortgage. Sec. 85 of the same statute provides that if such default shall continue for one month after the service of such notice, or for such other period as may in such mortgage be for that purpose fixed, the mortgagee may sell the land. Held, a demand was necessary in order to fix the time of payment of the money owing on the mortgage, and, as no default existed until such demand was made, that the mortgagor, after such demand and default, was entitled to notice, under Sec. 84, as a necessary preliminary to a sale under Sec. 85. National Bank of Australasia v. The United Hand-in-Hand, etc., Co., L. R. 4 A. C. 391..... 33

Notice.

A notice by unregistered letter, if it be shown to have reached the mortgagor, is sufficient compliance with Sec. 84 of the "Transfer of Land Statute" (Victoria, No. 301). The provision in that section as to registration of the letter is a precaution to be shown where the mortgagee is unable to prove actual receipt of the letter by the mortgagor. McDonald v. Rowe, 3 V. R. (E.) 143..... 238

Proprietor dead—Notice of demand.

Section 84 of the "Transfer of Land Statute" (Victoria, No. 301), provides that the notice required to be served on the mortgagor may be given by sending the same through the post-office by a registered letter, directed to the then proprietor of the land at his address appearing in the register book. Held, that although the proprietor be dead, that notice is sufficiently given if sent through the post-office by a registered letter addressed to such registered proprietor at the address appearing in the register book. Gunn v. Land Mortgage Bank of Victoria, Limited, et al., 12 A. L. T. 49 229

Notice, contents of.

A mortgage under the "Transfer of Land Statute" (Victoria, No. 301), made service of the notice contained in Sec. 84 of that Act, in manner therein mentioned, and a further default

in payment for seven days, a condition precedent to the exercise of the power of sale. Default was made in payment of interest, the principal not being yet due. The mortgagee served on the mortgagor notice that he would exercise the power of sale, "unless the money due under your mortgage be forthwith paid." Held, that the notice was bad, because it did not specify whether payment of interest only, or of principal and interest, was required. McDonald v. Rowe, 3 V. R. (E.) 143..... 238

Purchaser at mortgage sale.

Section 85 of the "Transfer of Land Statute" (Victoria, No. 301), provides that no purchaser from mortgagee exercising power of sale shall be bound to inquire into the fact of default or sufficiency of notice of sale. Held, per Molesworth, J., that a person having only a contract of sale by a mortgagee under the statute is a "purchaser" within Sec. 85, which validates contracts of purchase as well as registered transfers. But in the case of Ross v. The Victorian Permanent Building Society (q.v.), 8 V. L. R. (E.) 254, 265, Molesworth, J., expressed doubt as to the correctness of his former decision. McDonald v. Rowe, 3 V. R. (E.) 143 238

Proceedings stayed by tender.

Where a mortgage is made under the "Transfer of Land Statute" (Victoria, No. 301), upon default in payment of the interest, although the time for payment of the principal has not arrived, the mortgagee can be stayed from selling only by payment or tender of the whole amount of principal and interest. Hervey v. Inglis, 5 W. W & a'B. (E.) 125 339

Effect of unregistered transfer by mortgagee in exercise of power of sale.

Section 87 of "Victorian Land Transfer Statute." (No. 301) provides that upon registration of a transfer, signed by the mortgagee, for the purpose of sale after default and notice, the estate and interest of the mortgagee in the land therein described at the time of the registration of the mortgage shall pass

to and vest in the purchaser. Held, that no interest in the lands included in the mortgage could effectually pass to the purchaser until such registration, but that the transaction is merely an agreement for sale which, while creating equities between mortgagee and purchaser, is subject to any prior equities of the mortgagor. National Bank of Australasia v. The United Hand-in-Hand, etc., Co., L. R. 4 A. C. 391 33

Foreclosure.

Where land under the general law is mortgaged, and the land is subsequently brought under the "Transfer of Land Act," the mortgagee cannot obtain a foreclosure order under Sec. 129 of the "Transfer of Land Act, 1890" (Victoria). In re Smith, 15 A. L. T. 85 558

Actions by mortgagor.

The Victorian Statute (No. 1149 of 1890) provides (Sec. 125) that a mortgagor must have the consent in writing of the first mortgagee to bring in his own name an action for which such mortgagee might (under Sec. 124) sue. A mortgagor who had paid off the money due under the mortgage, and who had lodged the discharge for registration, but had not obtained actual registration thereof, brought action in his own name, without the written consent of the mortgagee, for use and occupation. Upon a special case, held, that the mortgagor must obtain consent before he can sue. But see Louch v. Ball, 5 V. L. R. (L.) 157. Taylor v. Wolfe & Co., 18 V. L. R. 727... 464

The consent of a mortgagee [the mortgage being under the "Transfer of Land Statute" (No. 301)] who had not entered into possession is not necessary to an action by the mortgagor for use and occupation against a tenant let in by the mortgagor subsequently to the mortgage. Louch v. Ball, 5 V. L. R. (L.) 157..... 429

Fixtures.

A mortgage of land under the "Transfer of Land Statute" (Victoria, No. 301), covers machinery erected upon the land if either the machinery became part of the land, or if the

owner of the machinery is estopped from denying that such machinery became part of the land. Austral Otis Co. (Ld.) v. Andrew Kerr & Co. (Ld.), 12 A. L. T. 108 396

WRITS OF FIERI FACIAS.

Writ does not attach to, after acquired land.

A copy of fi. fa. and statement specifying the land to be affected thereby, presented for registration under Sec. 139 of the Victorian Statute (No. 1149), cannot be registered by the Titles Office unless the estate or interest of the judgment debtor, against which it is sought to be registered, appears upon the register at the time the copy fi. fa. is lodged. It was not intended that such copy fi. fa. and statement should be retained in the office until such estate or interest should appear in the register. Richards v. Cadman, 17 V. L. R. 203 471

Priorities.

The interest of S. in a certain parcel under the "Transfer of Land Statute" (Victoria, No. 301), was an equity of redemption under a deed of defeasance executed by the mortgagee, who had taken a transfer of the land under the statute, absolute in form, as security. An execution creditor of S. lodged a writ of fieri facias for execution, and served upon the registrar a copy thereof, with a statement specifying the equity of redemption in these lands as the lands sought to be affected thereby. Subsequent to such service, and before the sale by the sheriff, S. sold by parol her equity of redemption to M., who had no notice of the writ of fi. fa. The sheriff afterwards sold under the fi. fa. the equity of redemption, which was purchased by the execution creditor. The mortgagee, although the execution creditor had paid the balance of the moneys owing by S., refused to execute a transfer to the execution creditor, but transferred to M., the purchaser from S. Upon suit by the execution creditor against the mort-

gagee and M., held, that proceedings under Sec. 106 of the "Land Transfer Statute" (Victoria, No. 301), did not affect the equity of redemption, and therefore the purchase by M. from the execution debtor was valid and had priority over the transfer by the sheriff to the execution creditor. Watson v. The Royal Permanent Building Society, 14 V. L. R. 283.. 185

Expiry of writ of fieri facias.

The Victorian Statute (No. 301, s. 106), expressly provides that every such writ shall cease to bind, charge, or affect the land unless a transfer upon a sale under such writ shall be left for entry upon the register within three months from the day on which the copy, accompanied by a statement of the lands sought to be affected thereby, was served upon the registrar. The policy of the Legislature was to prevent titles from being affected by the operation beyond a limited time of unexecuted writs of execution as charges on the land, and to reconcile the rights of a judgment creditor with those of a purchaser for value, whether with or without notice. Both objects are effected by compelling the creditor to proceed within a limited time to enforce an execution by actual sale of the land affected thereby. The Registrar of Titles v. Paterson, L. R. 2 App. Cas. 110 58

Time not extended by alias writ of fieri facias.

An alias writ may be duly issued to affect lands not previously affected by the execution. Such alias writ has the same operation as an original writ would have, but no more, i.e., it would affect the land for three months from the date of the service of the copy upon the registrar. A transferee under the alias writ would take subject to rights acquired before such service. Nor would the alias writ enlarge, contrary to the plain policy of the statute, the operation of the original writ by continuing the time beyond the period fixed for the expiration of such original writ. The Registrar of Titles v. Paterson, L. R. 2 App. Cas. 110 58

Irregularity in notice of sale by sheriff—Substantial compliance.

The Act 19 Vic. No. 19, s. 176 (Victoria), required one month's notice of intention of sheriff to sell under writ of fieri facias to be given in two newspapers. Land under the "Transfer of Land Statute" (Victoria, No. 301), was levied on. The sheriff advertised in the local newspaper of the 1st December, 1870, an intention to sell on the 3rd January, 1871; and in the Gazette of the 9th December, 1870, an intention to sell on the 10th January, 1871. The sheriff sold on the 10th January, 1871, and on the 31st January executed a transfer to the purchaser. Registration of the transfer was refused on the ground that notice of intention to sell on the 10th January was not advertised in two papers according to law. Held, that the object of the Act in directing advertisements was not so much to obtain competition and a fair price as to insure a reasonable time intervening between the first notice of sale and the actual sale, so as to prevent one person's land being seized and sold for the debt of another. The application of the purchaser to compel the Registrar-General to register the transfer granted, but without depriving him of his costs. In the matter of the "Transfer of Land Statute," Ex parte Ross, 2 V. R. (L.) 10 254

Sale under two writs—Priorities.

The "Transfer of Land Statute" (No. 301 of Victoria) provides (Sec. 106) that to bind land under the statute the registrar must be served with a copy of the writ and a statement of the land to be affected thereby. Where there were two execution creditors, their rights to the purchase money upon sale by sheriff are regulated by priority of lodging writ with sheriff, and not by priority of serving registrar with copies of the writs. Beath v. Anderson, 4 A. L. T. 151 528

Several sale by sheriff.

Under Sec. 106 of the "Transfer of Land Statute" (Victoria, No. 301), it is the duty of the Registrar of Titles to register the first

transfer under a sale from the sheriff which is lodged with him, if it be valid. After such registration he should refuse to register any transfer subsequently lodged. In every case it is his duty to determine the validity of the instrument lodged for registration, and if it appear not to comply with a condition in the instrument of title, he must decide for himself whether such condition is valid. In re the "Transfer of Land Statute," Ex parte Bond, 6 V. L. R. (L.) 458 257

Purchase of lease from Crown.

The purchaser at a sheriff's sale of a lease under the "Land Act, 1869" (Victoria), is entitled, on payment of overdue rent before entry by the Crown for non-payment, to obtain an injunction restraining the Crown from proceeding for a forfeiture. Kickham v. The Queen, 4 A. L. T. 37..... 530

Crown lease, condition not to assign.

A condition inserted in a Crown lease under the "Victorian Land Act, 1869," that no assignment or transfer should have any validity whatever until sanctioned by the Governor-in-Council, does not apply to an involuntary assignment, as by a sale under a writ of fi. fa. In re the "Transfer of Land Statute," Ex parte Ellison, 5 V. L. R. 59..... 502

It was sought to prevent registration of an assignment of a Crown lease by the sheriff under a writ of fi. fa. on the ground that there was a condition in the lease that no assignment or transfer should have any validity whatever until sanctioned by the Governor-in-Council. It was held, however, that the condition was not applicable to an involuntary assignment, as by a sale under a writ of fi. fa. In re the "Transfer of Land Statute," Ex parte Ellison, 5 V. L. R. 59 502

ASSURANCE FUND.

Mortgagee taking mortgage from fictitious transferee, the result of a forged transfer has no claim on.

M. was registered proprietor in fee simple of certain lands; C., her solicitor, had possession of the duplicate certificates of title and of a power of attorney from M. to her husband; C. forged a transfer of the lands by the husband as M.'s attorney to H., a fictitious and non-existing person. This transfer was duly registered. C. then, as representing H., applied for and obtained a loan from X., producing a mortgage of the same lands in favour of X. to secure the loan. This mortgage was duly registered. Upon suit by the true owner, the Supreme Court of Victoria (Messer v. Gibbs, 13 V. L. R. 854; 9 A. L. T. 106), directed the certificates to H. to be cancelled, and M.'s name entered as proprietor; that the mortgage was a valid incumbrance, but that M. was entitled to redeem and to be indemnified out of the assurance fund. Upon appeal by the registrar, representing the assurance fund, held, that the mortgage was invalid, and that the mortgagees had no remedy against assurance fund. For "the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences." Gibbs v. Messer, A. C. (1891) 248 1

Increased indemnity for risk in registering uncertain title.

Where there is a possibility of the title of the applicant being impeached in equity, though at law its validity is unquestioned, the Commissioner of Titles has a discretion, under Sec. 32 of the "Transfer of Land Statute" (Victoria, No. 301), to require such additional indemnity as he shall think proper before

issuing a certificate of title to the applicant. In the matter of the "Transfer of Land Statute," and in the matter of Charles Salter, 2 V. R. (L.) 113 243

VENDOR AND PURCHASER.

The purchaser made application to bring under the Act and obtained a certificate of title to the whole of the land occupied by the vendor, including a parcel of four acres abutting on the land, as described by metes and bounds in the deed. The purchaser had been let into possession of the land. The contract of sale contained the usual compensation clause. The vendor brought an action to recover compensation for the excess. Held, that if the vendor was now estopped through the completion of the contract from recovering compensation under the contract of sale, that he could recover under Sec. 144 of the "Transfer of Land Statute" (Victoria, No. 301). For the vendor was deprived of the four acres through the bringing of such land under the operation of the Act by the registration of the defendant as proprietor, and was entitled to damages against the defendant as the person by whose application the land was brought under the Act. Monaghan v. Gleeson, 13 V. L. R. 384 153

Waiver of condition.

The conditions of sale provided that if the purchaser did not accept title within fourteen days that the vendor should apply to bring the land under the Statute (No. 301 of Victoria), and that if the vendor failed to produce a certificate of title under the Act within six months from the day of sale the purchaser might rescind the sale. In an action for specific performance, held, that time was of the essence of the contract, and that it was the duty of the vendor, immediately on the purchaser's refusal to accept the title, to take steps to get the certificate of title; and that the fact of negotiations having been entered into to dispense with the necessity of bringing

the land under the Act did not amount to a waiver of the purchaser's right to insist on time being of the essence of the contract in regard to the six months. Davis v. Dougall, 15 V. L. R. 424 507

Caveat, vendor's duty to remove.

Under Sec. 58 of the "Transfer of Land Statute" (Victoria, No. 301), the registration, and not the execution, of the transfer divests the estate. Until registration the proprietor has not done all that is necessary to divest the estate out of himself and vest it in the transferee. It is, therefore, the duty of the vendor to have a caveat against registration of the transfer removed; and, although the caveat had lapsed and the registrar in treating it as in existence was in error, the vendor is bound to take the necessary steps to compel the registrar to register the transfer. Taylor v. The Land Mortgage Bank of Victoria, Limited, 12 V. L. R. 748 168

Purchaser not entitled to abstract.

Upon a contract for sale of land under the "Transfer of Land Statute" (Victoria, No. 301), in which the vendor undertakes to sign a transfer, the purchaser is only entitled to a transfer under the Act, and is not entitled to any abstract of title or production of documents. Davidson v. Brown, 5 V. L. R. (L.) 288. 424

Purchaser in possession.

A purchaser who is let into possession under the contract for the sale of the land to him is tenant at will to his vendor, and has at the same time an equity which would not allow his vendor to determine the tenancy at will except by converting it into an estate in fee simple. It is not possible to dissever the tenancy from the contract. Together they form an "interest" to which the land was subject under Sec. 49 of the Victorian Statute (No. 301), (which provides that the land shall be subject to the interest of any tenant of the land, notwithstanding the same may not be

specially notified as an incumbrance on the certificate), and which is entitled to prevail against the claim of a new proprietor under his certificate of title. Sandhurst Mutual Permanent Investment Building Society v. Gissing, 15 V. L. R. 329 466

Specific performance.

D., the registered proprietor of a parcel of land under the "Transfer of Land Statute" (Victoria, No. 301), sold the same to the municipality. The agreement for sale provided that the land sold should at all times thereafter be maintained and used as a site for municipal buildings, to be built to the satisfaction of the vendor. The buildings were erected, and the other terms of the agreement performed by the municipality. The vendor, however, refused to execute an absolute transfer under the statute, as she would thereby lose the benefit of the agreement with the municipality for contiguous user. Held, that D. was bound to execute a transfer, with such security as she could legally get; and this in the face of the registrar's refusal to enter the agreement as an incumbrance. The Mayor, etc., of Brunswick v. Dawson, 5 V. L. R. (E.) 2 179

Specific performance—Costs.

In an action for specific performance the defendant relied upon a condition that the vendor should within six months produce a certificate of title under the Statute (No. 301 of Victoria). On the day the six months expired the Examiner of Titles approved the examination, and on the same day the Commissioner of Titles assented to the application, but the certificate was not issued until fifteen days later. The vendor gave the purchaser notice that the application was approved, but the purchaser rescinded the contract. While the defendant succeeded, because time was of the essence of the contract, he was not allowed costs, as the land had been practically brought under the Act, and he could have dealt with it as if he had the title in his own hands. Davis v. Dougall, 15 V. L. R. 424 507

Words and phrases.

"Fraud, in Sec. 74 of the 'Transfer of Land Act, 1890,' means moral turpitude, actual dishonest dealing, and does not include what is known as 'constructive fraud.'" Per Williams, J. "The fraud referred to in the 'Transfer of Land Act, 1890,' is actual moral depravity, some intentional wrong-doing, or wilful violation of the common rule of right and wrong, and not constructive fraud." Per Hood, J. Gregory et al. v. Alger et al., 15 A. L. T. 22 532

"Tenant" wider than "lessee" (Victoria Statute, No. 301, Sec. 49). Sandhurst Permanent Investment Building Society v. Gissing, 15 V. L. R. 329; 11 A. L. T. 62 466

Words—"Secured."

The Victorian Statute (No. 301), by Sec. 84, provides that "in case default be made in payment of the principal sum, interest or annuity secured," etc. It was contended that there was no sum "secured" until registration of the mortgage, on the ground that the mortgage is only to have effect as a security when registered. Held, that the word "secured" refers both to the security created by the covenant to pay the principal and interest contained in a mortgage deed, and in force between the parties before its registration, and also to the security in respect to the land itself, which comes into existence only when the deed is registered. Mathieson v. The Mercantile, Finance and Agency Company, Limited, 17 V. L. R. 271 478

MISCELLANEOUS.

Transactions of insolvent after assignment.

Where the assignee of an insolvent estate, having lodged a caveat against any dealing with land forming part of such estate, makes an application to be registered as proprietor under Sec. 236 of the "Transfer of Land Act, 1890" (Victoria), during the existence of such caveat the registrar is bound to ignore all deal-

ings by the insolvent proprietor with land under the operation of the Act, and to register the assignee. In re Palmateer, 16 V. L. R. 793. 545

Laches of tenant.

Laches of tenant in asserting his statutory right. See Sandhurst Mutual Permanent Building Society v. Gissing, 15 V. L. R. 329..... 466

Intestacy.

Where a testator, although not devising the legal estate in his lands, gives his executor power to sell them, he does not die intestate as to such lands within the meaning of the "Transfer of Land Statute" (Victoria, No. 301), and a rule to administer such lands will not be granted. In the real estate of John Gow, deceased, 4 W. W. & a'B. (L. M. & M.) 18. 348

An executor is not, by virtue of his obligation to pay the debts of the deceased, "a person interested" in the real estate of his testator within the meaning of Sec. 67 of the "Transfer of Land Statute" (Victoria, No. 301), and is not entitled to a rule to administer under that Act. In the real estate of Margaret Hood. deceased, 4 W. W. & a'B. (L. E. & M.) 20..... 516

Ejectment—Evidence.

A duplicate certificate of title, issued under the Victorian Statute (No. 301) is admissible as prima facie evidence of title in ejectment. (Sed. qu. whether duplicate certificate is not conclusive evidence. See Certificate, conclusive effects of). Wilkinson v. Brown, 1 V. R. (L.) 86 433

The plaintiff in ejectment put in his certificate of title under the Victorian Statute (No. 301), and also went into evidence prior to the title, whereby it appeared that the legal estate was not in him. Held, that if he relied on his certificate alone he might have succeeded; but as he went outside the certificate, and thereby showed he had not the legal estate, he must be nonsuited. Miller v. Moresey, 2 V. R. (L.) 39 436

In a further proceeding in ejectment between the same parties, the plaintiff, who had ob-

tained from the registrar a new certificate in substitution for the one produced in the former action, put in the new certificate and gave no other evidence. Upon motion for nonsuit, held, that the certificate was conclusive evidence that the person named in it is proprietor. It is not necessary to prove the preliminary steps taken to procure the certificate. Miller v. Moresey, 2 V. R. (L.) 193 438

Demand before ejectment.

When R. had entered into possession of land under a contract made with a person from whom those seeking to eject him themselves derived title, held, that before they could maintain ejectment R. was entitled to a demand of possession. Colonial Bank v. Roach, 1 V. R. (L.) 165..... 374

Defendant need not disclose his title.

There is nothing in the "Transfer of Land Statute" (No. 301 of Victoria) generally enabling a plaintiff to transfer a legal right to a Court of Equity, or to compel a defendant to disclose his title. Jamieson v. Quinlan, 3 V. L. R. (E.) 230.

Offences under the Act.

Section 153 of the "Victorian Land Transfer Statute" (No. 301) enacts, inter alia, that any person wilfully making any false statement or declaration in an application to bring land under the Act, or fraudulently procuring the issue of a certificate of title, is guilty of a misdemeanour. In a case the only evidence in support of the charges was that appearing upon the application, and the statutory declaration of the accused filed in support of it, produced by the proper officer from the Office of Titles, and the certificate of title granted thereupon, and the reasonable inference to be drawn therefrom, together with evidence that the material statements in such declaration were false. Upon a case reserved, held, that the evidence was sufficient to support a conviction. Regina v. Aedy, 13 V. L. R. 746.... 145

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